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CHARLES ELMORE CROPLEY
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Nos. 1114-1115

IN THE

SUPREME COURT OF THE UNITED STATES

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GULF REFINING COMPANY,
Petitioner and Appellant Below,

vs.

MARK C. WALKER & SON COMPANY, ET AL.,
Respondents and Appellees Below.

GULF REFINING COMPANY,
Petitioner and Appellee Below,

vs.

CHARLES WEAVER & COMPANY, INC.
Respondent and Appellant Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The decisions sought to be reviewed are Gulf Refining Co. v. Mark C. Walker & Son Company, et al. and Charles Weaver & Company, Inc. v. Gulf Refining Company, 124 Fed. (2d) 420 (6 C.) decided January 8, 1942. Section 240 of the Judicial Code is believed to sustain the jurisdiction of this court.

SUMMARY STATEMENT OF THE CASE.

In February, 1939, Gulf Refining Company, petitioner, gave Shelby County, Tennessee, a right of way easement deed across its land for the construction of a levee (R. 11).

In March, 1939, petitioner gave Shelby County written permission to fill a gully thirty or forty feet west of the levee right of way (R. 84). This gully is the source of the litigation.

The gully, about 25 feet wide and 17 feet deep, was spanned by four pipe lines six inches in diameter used to pump gasoline from Mississippi River barges to storage tanks east of the levee right of way. All of the lands involved had been owned and operated for many years by petitioner as a river storage terminal.

In May, 1939, the United States let the levee contract and the work of filling the gully to Walker & Son, which sub-let, in June, 1939, the work to Weaver & Company. Petitioner did not learn these details until after its loss hereinafter described.

A short time before October 13, 1939, the gully was filled and the pipes spanning the gully were covered with dirt, the sub-contractor using tractors, bulldozers and other heavy machinery.

The work was done in such a negligent manner that, unknown to the petitioner, the lines and supporting concrete beams, reinforced with steel, were greatly damaged and the pipe joints were broken as the result of the negligent use of the heavy machinery in and about the pipes.

On October 13, 1939, two of petitioner's barges containing gasoline moored at the floating dock and began, about 9 o'clock at night, pumping gasoline through the lines, which were in the damaged condition described, but unknown to petitioner. A large quantity of gasoline was lost (R. 9, 39, 59).

Petitioner sued Shelby County and the general contractor in the District Court, and upon later learning the gully was filled by a sub-contractor, filed an independent suit against it. The cases were consolidated for trial.

Shelby County was sued for breach of the license and easement contracts which, by implication, imposed the duty that due care be exercised in the use of the privileges therein conferred. In the alternative it was sued in tort for the negligence of its agents, servants and representatives who entered and filled the gully in a negligent manner.

The general contractor and the sub-contractor were also sued in tort for negligence.

Shelby County filed a motion for summary judgment on the pleadings, which the District Court granted, holding that there was no privity of contract between the County and petitioner for breach of which an action could be maintained. The motion was sustained on the further ground that the County was not liable for negligence in the performance of a governmental function (R. 34). The Circuit Court affirmed.

There was a trial by jury as to the general contractor and the sub-contractor.

At the conclusion of the evidence the general contractor was granted a directed verdict on the theory it was not liable for the negligence of its sub-contractor (R. 390). The Circuit Court affirmed.

There was a verdict against the sub-contractor for $9,000.00 (R. 390). The Circuit Court held the evidence insufficient to support a verdict, that the District Court should have granted the sub-contractor's motion for a directed verdict, and stated: "8747 is reversed", which means a dismissal of the suit as there was no direction for a new trial.

These conclusions are a total departure from the settled law of Tennessee which the courts below should have applied in conformity with the recent decisions of this court.

The decision of the Circuit Court that the judgment against the sub-contractor be reversed and the suit dismissed violates the Seventh Amendment. The reversal, if the evidence was insufficient to sustain the judgment, should have been for the purpose of a new trial.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

(a) The Circuit Court may not, after a general jury verdict for plaintiff, reverse and dismiss the action, but must reverse and order a new trial unless at the time of defendant's motion for a directed verdict, the District Court reserved decision thereon until after the jury verdict. The Seventh Amendment to the Constitution as-

sures all that "no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

The District Court made no reservation of its decision pending action by the jury, and therefore the Seventh Amendment requires that the judgment against the subcontractor be reversed by the Circuit Court, if reversal is necessary, for the purpose of a new trial, which the Circuit Court failed to do. The Circuit Court may not reverse and order dismissal of the suit against the subcontractor.

(b) District Court Rule 50(b) that "the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion" is in and of itself a violation of the Seventh Amendment and may not change the result above stated. The rules of the common law in effect when the amendment was adopted did not contemplate or permit the substitution of a fiction (deeming) for an actual and real reservation of the trial court's decision on the motion.

The courts may not adopt rules which impair trial by jury according to the rules of common law in effect when the amendment was adopted.

(c) Rule 50(b) has resulted in confusion and conflicts in the decisions of the Circuit Courts which should be settled. It provides further:

> "Within ten days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict."

Some circuits have held that filing a motion within ten days is not a condition precedent to the right of the Circuit Court to reverse the jury verdict and dismiss, while others have held it is.

The sub-contractor at bar did file within ten days of the judgment a motion for new trial but not a motion for judgment in accordance with its motion for a directed verdict (R. 391). This deprived the Circuit Court of the authority to reverse and dismiss because of the rule and the Seventh Amendment.

II.

The Tennessee statutes and its courts' interpretations thereof provide that counties may be sued for breach of contract, express or implied, whether growing out of a governmental function or otherwise. The Federal Courts are bound by such decisions, which the Circuit Court failed to follow.

III.

The Tennessee Supreme Court has held that a county may be sued for an affirmative tort committed on privately owned lands even though the act grew out of a governmental function. The Federal Courts are bound by such decisions, which the Circuit Court failed to follow.

IV.

The license contract to fill the gully was founded on personal trust and confidence reposed in the licensee, Shelby County, and was not assignable. The general contractor and sub-contractor were as a matter of law the agents and servants of Shelby County, for whose negligence the County is liable.

V.

The general contractor may not escape liability for the acts of the sub-contractor as principles governing independent contractors never arise and cannot be applied to defeat the landowner's rights flowing from the grant of a license.

VI.

The right of way easement deed granted the County and its assigns the right to construct and maintain the levee thereon, required "that proper and adequate provision shall be made for the continued use of the existing pipe lines" and released the County "its officers, agents, and employees from any and all damages **to the hereinbefore described tract of land**, by reason of constructing the aforesaid levees" etc. The Circuit Court construed this to mean "It goes no further, in obligating the County, than to covenant that the flood control operations were not such as to require the displacement of the pipe lines or to interfere with their operations through any planned or affirmative acts of the County or the contractors." This was error because it is not a reasonable and fair interpretation of the contract and wholly ignores the implied contractual obligation and condition that the work be done in a careful and prudent manner. Such construction means that so long as the lines were not displaced either the County or contractors could negligently damage them without liability. Such a result shocks fundamental conceptions of our jurisprudence.

The license contract given later to fill the gully, not a part of the levee right of way, is a simple written permission to the County to do so without elaboration of conditions. While the instruments are separated by time,

subject matter and legal consequences, the Circuit Court by interpretation, transposed into the license the above quoted parts of the easement and reached the same conclusion as to the license contract. Such interpretations are erroneous.

VII.

There was an abundance of substantial evidence of negligence by the sub-contractor. It was error for the Circuit Court to reverse the judgment entered by the District Court on the jury verdict.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and to send to this court a full and complete transcript of the record and of the proceedings of that court in the cases of Gulf Refining Company v. Mark C. Walker & Son Company, et al., and Charles Weaver & Company, Inc. v. Gulf Refining Company, Nos. 8746 and 8747, to the end that said cases may be reviewed and determined by this court as provided for by the statutes of the United States and that the judgment of the Circuit Court of Appeals for the Sixth Circuit be reversed in each of said cases, and for such further relief as to the court may deem proper.

Dated the 31st day of March, 1942.

EDWARD P. RUSSELL,
Counsel for Petitioner.

BRIEF.

The opinion of the Circuit Court of Appeals appears on Page 422 of the record, and is reported in 124 Fed. (2d) 420, and was rendered on January 8, 1942.

Section 240 of the Judicial Code, 28 U. S. C. A. 347, is believed to sustain the jurisdiction of this court.

POINTS AND AUTHORITIES RELIED ON.

A.

The Seventh Amendment requires that the Circuit Court, upon concluding the evidence insufficient to sustain a jury verdict, remand for a new trial if there was a motion for a directed verdict and denial thereof prior to the jury verdict. District Court Rule 50(b) does not change the result because it violates the Seventh Amendment.

Slocum v. New York Life Insurance Co., 228 U. S. 364
Dimick v. Schiedt, 293 U. S. 474
Baltimore & Carolina Line v. Redmond, 295 U. S. 654
Berry v. United States, 312 U. S. 450

B.

In order for the Circuit Court to reverse and dismiss for insufficiency of evidence to sustain the jury verdict there must have been a motion in the District Court for a directed verdict, followed within ten days after the reception of the verdict by a motion for judgment notwithstanding the verdict.

District Court Rule 50(b)

C.

Shelby County is liable for breach of its contracts.

Williams Tennessee Code, Secs. 740, 742
Wood v. Tipton County, 66 Tenn. 112
Madison County v. Gibbs & Dean, 77 Tenn. 383
McAndrews v. Hamilton County, 105 Tenn. 293
Claiborne County v. Brooks, 111 U. S. 400
Oak Grove Construction Co v. Jefferson County, 219 Fed. 858 (6 C.)

D.

A license is founded on personal trust and confidence reposed in the licensee and is not assignable. All who act pursuant to the license are the agents of the licensee.

DeHaro v. United States, 72 U. S. 599
Slidell v. Grandjean, 111 U. S. 417
Peabody v. United States, 175 U. S. 550
United States v. Elder, 177 U. S. 113
Troy Iron & Nail Factory v. Corning, 14 How. 193
Bloomstein v. Cless Bros., 3 Tenn. Chy. Rep. 431
Barksdale v. Marcum, 7 Tenn. App. 697
Nunnally v. Southern Iron Co., 94 Tenn. 397
Foster v. Lake County, 132 Ore. 374
Railway Co. v. Beatty, 5 Tenn. Civ. App. 186
Ruehl v. Telephone Co., 23 N. D. 6

E.

The licensee is liable for damages resulting from negligence in doing the thing which the license authorizes.

37 Corpus Juris, p. 287
Eaton v. Winnie, 20 Mich. 156
Seldon v. Del. & Hud. Canal Co., 20 N. Y. Rep. (Court of Appeals) 634
Woodruff v. Beekham, 43 N. Y. Sup. Ct. 282
Keithley v. Hettinger, 133 Minn. 36
Sayles v. Bemis 57 Wis. 315

F.

Private property may not be damaged for public use and benefit without just compensation.

Constitution of the United States, Fifth Amendment
Constitution of Tennessee, Article I, Sec. 21
Pumpelly v. Green Bay Co., 80 U. S. 166
Shelby County v. Dodson, 13 Tenn. App. 392

G.

The county is liable for negligence when engaged in a governmental function and there is a departure from county property and a wrong to private property.

Chandler v. Davidson County, 142 Tenn. 265
Pierce v. Gibson County, 107 Tenn. 224
Chattanooga v. Dowling, 101 Tenn. 342

ARGUMENT.

I.

THE SEVENTH AMENDMENT.

The Circuit Court has in effect dismissed the judgment and suit against the sub-contractor for $9,000.00. This is error. It should have remanded the case for a new trial. Its failure to do so is a violation of the Seventh Constitutional Amendment clearly shown by the decisions of this court.

We understand that the reversal of the judgment against the sub-contractor and the language of the Circuit Court means that the suit against the sub-contractor is to be dismissed by the District Court. When a case is reversed and remanded for a new trial it is customary and imperative for the appellate court to clearly so state. Exactly what the Circuit Court intended to order by this language is obscure, confusing and a litigant should not be left in such a dilemma.

This court has held that where the defendant made a motion for a directed verdict, which was overruled, and subsequently there was a general verdict for the plaintiff, the Circuit Court, upon finding that the evidence is insufficient to support the verdict, shall remand the case for a new trial and has no right to direct that judgment be entered for the defendant. The question has recently been before this court, but was pretermitted. It was earmarked by Mr. Justice Black an "important point."

Berry v. United States, 312 U. S. 450.

Petitioner sued the United States on his War Risk Insurance contract. The jury found for the petitioner. Mr. Justice Black stated:

> "The government, without having made any motion either for a new trial or for judgment notwith-

standing the verdict, took the case to the Circuit Court of Appeals. Upon review that court held plaintiff had not produced sufficient evidence to justify submission of the cause to the jury. The court did not, however, remand the case to the District Court for further proceedings, but reversed the judgment and dismissed the cause of action. The petition for certiorari presented two questions: First, whether there was sufficient evidence to sustain the verdict; second, whether the Circuit Court of Appeals erred in dismissing the cause instead of remanding it for a new trial. This second question invoked our jurisdiction in order to obtain an authoritative construction of subdivision (b) of Rule 50 of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c. In part that subdivision provides: 'Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is demed to have submitted the action to the jury subject to a later determinaion of the legal questions raised by the motion. Within ten days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; * * *' Since the government made no such motion within ten days after the verdict, petitioner urged here that the Circuit Court of Appeals was without power to dismiss the cause but should have remanded it for a new trial. **But while this important point, upon which the Circuit Court of Appeals are not in complete agreement, is one of the two questions upon which the petition for certiorari rested, there is no occasion for us to reach it here.** For we find that there was sufficient evidence to sustain the jury's verdict, and we hold that the District Court properly denied the government's motion for a directed verdict in its favor."

The point originates under the Seventh Amendment.

Baltimore & Carolina Line v. Redmond, 295 U. S. 654.

> "'In Slocum v. New York Life Insurance Co., 228 U. S. 364, a jury trial in a Federal Court resulted in a general verdict for the plaintiff over the deendant's request that a verdict for it be directed. Judgment was entered on the verdict for the plaintiff, and the defendant obtained a review in the Court of Appeals. The court examined the evidence, concluded that it was insufficient to support the verdict, and on that basis reversed the judgment given to the plaintiff on the verdict, and directed that judgment be entered for the defendant. Writ of certiorari then brought the case here. The question presented to us was whether, in the situation disclosed, the direction for a judgment for the defendant was an infraction of the Seventh Amendment. We held that it was, and that the direction should be for a new trial."

This court, however, considered in Baltimore & Carolina Line v. Redmond, supra, a different situation. The motion for a directed verdict was overruled. There was a jury verdict for the plaintiff, but before the District Court overruled the motion

> "the court reserved its decision on both motions, submitted the case to the jury subject to its opinion on the questions reserved, and received from the jury a verdict for the plaintiff. No objection was made to the reservation or this mode of proceeding. Thereafter the court held the evidence sufficient and the motion ill grounded, and accordingly entered a judgment for the plaintiff on the verdict."

The Circuit Court held the evidence insufficient and reversed the judgment with a direction for a new trial. The defendant's certiorari petition was granted by this

court urging that the Circuit Court should have directed the dismissal of the case. In this court's opinion emphasis was given to the mandate of the Seventh Amendment that "no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

This court said:

> "The aim of the amendment, as this court has held, is to preserve the substance of the common law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instruction by the court."

This court then entered a discussion of "the rules of the common law" and pointed out that in Slocum v. New York Life Insurance Company the defendant's motion for a directed verdict was not taken under advisement by the court pending the jury verdict, but was overruled without reservations and the case submitted to the jury.

In Baltimore & Carolina Line v. Redmond the motion for a directed verdict was overruled, but the court reserved its decision thereon and submitted the case to the jury. Because of the fact that the trial court so reserved is decision until after the jury verdict, this court concluded that such practice was consistent with the rules of the common law as they existed at the time of the adoption of the Seventh Amendment, and such reservation conferred upon either the trial court or the appel-

late court the authority, after the jury verdict, to enter an order sustaining the motion for a directed verdict upon proper showing. This court said:

> "At common law there was a well established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved; and under this practice the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as non suiting the plaintiff where he had obtained a verdict, entering a verdict or judgment for one party where the jury had given a verdict to the other, or making other essential adjustments."
>
> * * *
>
> "In view of the common law practice and the related State statute, we reach the conclusion that the judgment of reversal for the error in denying the motion should embody a direction for a judgment of dismissal on the merits, and not for a new trial.."

Recognizing the common law rules and practices as they existed at the time of the adoption of the Seventh Amendment, this court held that the trial Judge may reserve decision on the motion for a directed verdict until after the jury verdict, and thereupon either the trial Judge or the appellate court may sustain the motion for a directed verdict and dismiss the action though there was a general jury verdict for the plaintiff. Such procedure is consistent with the Seventh Amendment. On the other hand, if the trial Judge overrules the motion for a directed verdict without reservations and there is a general jury verdict for the plaintiff, the Circuit Court, upon concluding that the evidence is insufficient to support the

jury verdict, must remand the case for a new trial and may not, without violating the Seventh Amendment, dismiss the action.

In Slocum v. New York Life Insurance Co., 228 U. S. 364, mentioned supra, this court said on page 380.

> "While it is true, as before said, that the evidence produced at the trial was not sufficient to sustain a verdict for the plaintiff and that the Circuit Court erred in refusing to so instruct the jury, this does not militate against the conclusion just stated. According to the rules of the common law, such an error, like other errors of law affecting a verdict, could be corrected on writ of error only by ordering a new trial. In no other way could an objectionable verdict be avoided and full effect given to the right of trial by jury as then known and practiced. **And this procedure was regarded as of real value**, because, in addition to fully recognizing that right, it afforded an opportunity for adducing further evidence rightly conducing to a solution of the issues. In the posture of the case at bar the plaintiff is entitled to that opportunity, and for anyhing that appears in the record it may enable her to supply omissions in her own evidence, or to show inaccuracies in that of the defendant, which will rightly entitle her to a verdict and judgment in her favor."

Dimick v. Schiedt, 293 U. S. 474.

It was violative of the Seventh Amendment for a District Judge to condition denial of the plaintiff's motion for a new trial on the ground of inadequate damages solely upon defendant's consent to an increase, to a specified amount, of the damages awarded by a jury, but should have granted plaintiff a new trial.

It was said:

> "Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

Also:

> "The common law is not immutable but flexible and upon its own principles adapts itself to varying conditions. Funk v. United States, 290 U. S. 371. But here we are dealing with a constitutional provision which has in effect adopted the rules of the common law in respect of trial by jury as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, qua common law, but to alter the Constitution. The distinction is fundamental, and has been clearly pointed out by Judge Cooley in 1 Const. Lim. (8th Ed.) 124."

District Court Rules, 50 (b) states that whenever a motion for a directed verdict is made "the court is deemed" to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion.

The common law practice in effect at the time of the adoption of the Seventh Amendment dealt with a real and actual reservation by the trial Judge as distinguished from a court rule that "is deemed to have" reserved the decision.

This rule presents a serious constitutional question because the courts have no power to adopt rules inconsistent with constitutional guaranties that all are en-

titled to jury trials "according to the rules of the common law" as they existed at the time of the adoption of the Seventh Amendment. To substitute a fiction for a reality is a destruction of constitutional guaranties.

The same rule provides that within ten days the defendant "may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative."

In the case at bar the sub-contractor against whom judgment was rendered moved within ten days for a new trial, but did not move to have judgment entered in accordance with his motion for a directed verdict (T. 391). It therefore seems to inevitably follow that the Circuit Court erred in failing to remand for a new trial as to the sub-contractor even though the Refining Company's evidence may have been insufficient to support the verdict because such was the clear common law rule of procedure and practice in effect at the time of the adoption of the Seventh Amendment and announced by the decisions of this court.

Mr. Justice Black pointed out in Berry v. United States, supra, that the Circuit Courts of Appeal are not in agreement about the meaning of District Court Rule 50(b). He cited in the footnote to the opinion decisions from the Fourth and Fifth Circuits which are at complete variance with one another. It is important that the meaning of this rule and the practice thereunder be determined by this court to relieve litigants and lawyers of the existing confusion.

In United States v. Halliday, 116 Fed. (2d) 812 (4 C. 1941) there was a jury verdict and judgment for the plaintiff on a War Risk Insurance contract. The Circuit Court reversed and dismissed for insufficiency of evidence. During the trial there was a motion for a directed verdict, which was overruled. The United States did not move in the trial court for a judgment in its favor notwithstanding the verdict, but the Fourth Circuit held that such failure "does not restrict our power in the premises" and proceeded to dismiss the action without remand for new trial. Such practice is in direct conflict with the decisions of this court and we believe to be a violation of the Seventh Amendment.

In the other cases cited by Mr. Justice Black in the footnotes to Berry v. United States, supra, a diametrically opposed result was announced. In Pruitt v. Hardware Dealers Mutual Fire Ins. Co., 112 Fed. (2d) 140 (5 C. 1940) the defendant moved for a directed verdict. The trial court reserved judgment thereon. The case was submitted to the jury, which found for the plaintiff. Within ten days the defendant filed a motion for judgment notwithstanding the verdict, which the court granted. The plaintiff appealed. The Circuit Court's disposition of the case was:

> "The judgment in favor of the appellee is reversed, and the cause remanded with direction to the District Judge to pass upon the motion for a new trial."

The Seventh Amendment is a barrier to the application of District Court Rule 50(b). If not, which of the above Circuit Courts is correct? The question is timely and important.

If the rule is free from constitutional inhibitions it must be taken at face value and its simple language respected. For the rule to be applicable the defendant must have made within ten days of verdict a motion for judgment n. o. v. The sub-contractor did not do so. It follows the Circuit Court erred in failing to remand for a new trial.

II.

THE COUNTY IS LIABLE FOR BREACH OF ITS CONTRACTS.

Petitioner seeks to hold the County for breach of the license contract, or in the alternative, for breach of the right of way easement contract. There seems to be a widespread impression that counties are almost entirely immune to suits. This is not so under the Tennessee law which this court has admonished the lower Federal Courts to follow in such matters.

Moore v. Illinois Central R. Co., 312 U. S. 630

> "We granted certiorari in this case, 311 U. S. 643, to review a judgment in which the Circuit Court of Appeals applied a Mississippi statute of limitations contrary to the Mississippi Supreme Court's application of the same statute to the same plea in the same case.
>
> * * * * *
>
> "And in the absence of a change by the Mississippi Legislature, the court below could reconsider and depart from the ruling of the highest court of Mississippi on Mississippi's statute of limitations only to the extent, if any, that examination of the later opinions of the Mississippi Supreme Court showed that it had changed its earlier interpretation of the effect of the Mississippi statute.

In Tennessee counties are made liable for breach of contract to the full extent of liabilities imposed on corporations.

Williams Tennessee Code, Sections:

740. SUITS AGAINST COUNTIES AND SERVICE OF PROCESS.—Suits may be maintained against a county for any just claim, as against other corporations, and process shall be served on the presiding officer of the county court. (1857-58, ch. 15, sec. 2)

742. PROPERTY, POWER TO HOLD AND DISPOSE OF; CONTRACTS AND ACTS.—Each county may acquire and hold property for county purposes, and make all contracts necessary or expedient for the management, control, and improvement thereof, and for the better exercise of its civil and political powers; and may make any order for the disposition of its property.

The leading case, a land mark in Tennessee case law, states emphatically that the statutes make counties liable for breaches of all lawful contracts.

Wood v. Tipton County, 66 Tenn. 112 (1874).

Plaintiff's mule was damaged as the result of a public bridge being out of repair. Recovery was denied.

"Within their prescribed spheres the counties legislate for the public good, in respect to ordering the laying out of roads, building bridges, and such other local improvements as are for the public benefit, and authorized by law. They are no more liable to be sued for neglect of the duty of its officers than is the State for similar neglect of duty by its officers. The common law gives no such action, and it is therefore not sustainable at all, unless given by the

> statute: Cooley's Con. Lim., 247. We have no statute subjecting counties to suits for damages arising from neglect of the county officers. The county is declared a corporation to facilitate the execution of the powers delegated to it as a local legislature, and to enable it to make binding contracts, and **to be liable to suit for just claims arising under such contracts.**"

McAndrews v. Hamilton County, 105 Tenn. 293 (1900).

Suit was instituted for the negligent performance of duty by an employee in a county reformatory. Recovery was denied. The court said:

> "The general rule is that counties are not liable for torts or negligence in the condition, use and management of public institutions.
>
> * * * * *
>
> "Its liability to suit only extends to matters of contract and not to torts or the negligence of its employees."

Madison County v. Gibbs & Dean, 77 Tenn. 383 (1882).

The county let a contract "to have the levee and bridges on Irvine's levee repaired." The contractor abandoned the work. "Afterwards, the plaintiffs were requested by the commissioners to furnish the materials, and perform the work, with an agreement that the value when completed should be determined by two persons, one to be selected by the commissioners and the other by the plaintiffs, they to select a third person in case of disagreement." After the work was completed the plaintiffs were compelled to sue the County, which defended on the ground that the verbal agreement did not meet the statutory requirements for a County to make a con-

tract. The court held the County liable on implied contract.

> "What his Honor meant was that an express contract was not necessary. The counsel of the appellant so understood the charge and insist that the county cannot be held liable on an implied contract."

The County was held liable as the work was done with the knowledge and consent of the Commissioners and the County therefore had to pay what the work, labor and materials were reasonably worth. The case is cited to point out the broad scope of a County's liability on contract—express or implied, written or unwritten.

Claiborne County v. Brooks, 111 U. S. 400.

Claiborne County, Tennessee, was sued on its commercial paper. This court held that under the laws of Tennessee, the County was without authority to issue the commercial paper and therefore the County was not liable. This court recognized, however, that if the County had possessed authority to issue the paper, the plaintiff could recover on the contracts.

The opinion quoted the Tennessee statute that the County may be sued for breach of any contract. This court said:

> "It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State."

Oak Grove Construction Co. v. Jefferson County, 219 Fed. 858 (6 C., 1915).

Jefferson County, Tennessee, made a contract with a partnership for road construction. The partnership assigned the contract to a corporation which did the work. The corporation had to sue the County for its money. The County defended on the ground that it had no written contract with the plaintiff and had not assented to the assignment. The court granted a recovery on an implied contract as the County knew the corporation had taken the assignment and did the work over a long period of time without objection from the County. The plaintiff's action was to recover in the alternative on either the assignors' original express written contract or, if unsuccessful, to recover on the implied contract. There was a recovery on the implied contract.

The court said:

> "It is freely admitted that it was within the power of the Board of Commissioners to make a completely valid and binding contract with the plaintiff for all this road work. * * * * Defendant cannot deny that plaintiff may sue under the contract, and thus defeat the action as one on express contract, and, at the same time insist that plaintiff was acting pursuant to an express contract, and thus defeat the claim to recover **under an implied contract.**"

It seems beyond doubt that the County may be held for breach of contract but the Circuit Court stated the petitioner's attempt to hold the County on either of the contracts "would raise a serious question as to the authority of the County to undertake such obligation."

The Circuit Court cited no authority for this unusual conclusion. With due deference we submit it is erroneous and at total variance with the Tennessee statutes and decisions.

THE LICENSE.

The license was addressed to Mr. Fowler, Memphis City Engineer, who admittedly was acting for Shelby County, and provided:

> "Confirming recent conversation in your office, this is to advise that the Gulf Refining Company grants you permission to fill the ditch at the west end of their property to protect the proposed levee."
>
> R. 40.

The District Court and the Circuit Court attach no importance to the nature of a license and wholly ignored the implied condition of all such licenses that the licensee is required to exercise reasonable care in the use thereof.

They exonerated Shelby County by concluding that there was no contract between petitioner and the County for which an action will lie. The legal consequences and aspects of a license have been fully discussed by this court.

DeHaro v. United States, 72 U. S. 599.

In 1844 the Mexican Governor of California executed an instrument authorizing certain lands to be used for grazing cattle. After California became a part of the United States this lawsuit arose to determine whether the instrument was a deed or a mere license. This court held that it was a mere license limited by the common law rules relating to licenses. This court said:

"There is a clear distinction between the effect of a license to enter lands, uncoupled with an interest, and a grant. A grant passes some estate of greater or less degree, must be in writing, and is irrevocable, unless it contains words of revocation; whereas a license is a personal privilege, to be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it. There are also other incidents attaching to a license. It is an authority to do a lawful act, which, without it, would be unlawful, and while it remains unrevoked is a justification for the acts which it authorizes to be done. It ceases with the death of either party, and **cannot be transferred or alienated by the licensee, because it is a personal matter, and is limited to the original parties to it.**"

DeHaro v. United States has been cited and approved as a proper definition of a license in:

Slidell v. Grandjean, 111 U. S., p. 417;
Peabody v. United States, 175 U. S. 550;
United States v. Elder, 177 U. S. 113.

Troy Iron & Nail Factory v. Corning, 14 Howard, 193.

On page 216, the Court said:

"A mere license to a party, without having 'his assigns' or equivalent words to them, showing that it was meant to be assignable, is only the grant of a personal power to the licensee, and is not transferable by him to another."

Bloomstein v. Cless Brothers, 3 Tenn. Chy. Rep., 431.

"A mere license is, in its very nature, revocable, and confined to the parties between whom it is made."

Barksdale v. Marcum, 7 Tenn. App., 697.

"A license with respect to real estate is an authority to do a particular act or series of acts on another's land without possessing any estate therein. It is not assignable, and is generally revocable at the will of the licensor. Words and Phrases Judicially Defined, Vol. 5, p. 4133."

Nunnelly v. Southern Iron Co., 94 Tenn., 397.

"1. Were the several written instruments plead and relied on by defendants mere licenses, personal to the licensees, and not assignable, but revoked or expired when transferred by the licensees? Or did they create such essential and permanent rights as to be in the nature of easements running with the realty, and assignable so as to operate as a protection to the assignees thereof?

* * * * *

"The instrument contains no words of grant, and by the express terms thereof, it is limited to the Warner Iron Company only so long as said company shall run or have run the washers in question; so that, by the very terms of the instrument, the license would terminate whenever the Warner Iron Company placed it beyond its power to further operate these washers, or to have them operated."

The Circuit Court was unwilling to make available to petitioner the plain attributes connoted by a license and stated in the above decisions. It said "while it is urged that the license to go upon the lands of the Refining Company for the purpose of filling the gully is a grant, separate and distinct from the easement, and so but a mere personal license to Shelby County and unassignable, the argument is not persuasive."

The decisions of this Court and the Tennessee Courts to the contrary pass the question beyond persuasiveness. They are imperative and conclusive.

The Circuit Court next said "The two grants must be construed in pari materia. The license is supplemental to the easement."

The two writings do not relate to the same subject matter. "In pari materia" is a principle invoked in the construction of statutes and has no application to contracts.

U. S. v. Stewart, 311 U. S. 60.

Mr. Justice Douglas said:

> "It is clear that 'all acts in pari materia are to be taken together, as if they were one law.' U. S. v. Freeman, 3 How. 556, 564. That these two acts are in pari materia is plain. Both deal with precisely the same subject matter, viz., the scope of the tax exemption afforded farm loan bonds. The later act can therefore be regarded as a legislative interpretation of the earlier act (Cope v. Cope, 137 U. S. 682, 688; cf. Stockdale v. Insurance Companies, 20 Wall. 323, 331-332) in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting."

United States v. Colorado & N. W. R. Co., 157 Fed. 321 (8 C. 1907).

> "The rule in pari materia, which counsel for the company invoke, the rule that the similar terms of statutes enacted for like purposes should receive like interpretations, is inapplicable to the interstate commerce act and the safety appliance acts, because the provision of the latter relative to the question before us is plain and explicit, and a statute falls

under that rule only when its terms are ambiguous or its significance is doubtful (Endlich on Interpretation of Statutes, par. 53, p. 67), and because the evils to be remedied, the objects to be accomplished, and the enactments requisite to attain them are radically different.

* * * * *

"Neither in their subjects, in the mischiefs they were enacted to remove, in the remedies required, nor in the remedies provided, do these acts relate to similar matters, and the rule that the words or terms of acts in pari materia should have similar interpretations ought not to govern their construction."

To merge a license to fill a gully into a prior easement grant for a levee right of way and thus destroy the legal significance of a license by resort to "in pari materia" is an anomaly.

Assuming that the license may not thus be shorn it follows the licensee is responsible for negligence in the use thereof.

37 Corpus Juris, Par. 185, p. 287:

"The license is a protection if the licensee acts in a proper and careful manner, and under such circumstances there is no liability for damages resulting from the act, but it is no protection from damages arising from improper conduct, whether intentional or due to a failure to exercise skill or care in doing the thing which the license authorizes."

Eaton v. Winnie, 20 Mich. 156, 4 Am. Rep. 377 (1870).

Opinion by the celebrated Judge Cooley.

The landowner gave Eaton permission to pasture his sheep upon land. The licensee brought infected sheep upon the land under circumstances which should have caused the licensee to know they were infected. The infection was communicated to the landowner's sheep. The landowner sued and recovered judgment for the abuse of the privilege and the negligent use thereof. Judge Cooley said:

> "And the wrong becomes very palpable and very gross, when, under a mere permission for a family to remain on the land, the party assumes to bring infection upon it, of a character which must remain after full possession has been surrendered. It is very evident to us that the license given was exceeded, and the gratuitous privilege Eaton had solicited was grossly abused, and that he ought in justice to be held responsible for the consequent damages."

Seldon v. Del. & Hud. Canal Co., 29 N. Y. Rep. (Court of Appeals) 634 (1864).

"A license to enlarge the canal would authorize an increase of the depth of the channel as well as of the width, and such increase of depth might be produced by excavations from the bottom, or by raising the banks, or by both; and the license, so long as it remained in force, would not only relieve the licensee from liability for making the enlargement, but also from liability for any consequences which might naturally flow from such enlargement. (Stevens v. Stevens, 11 Met. 251; 1 Washb. on Real Prop. 398, par. 6.) If the injury to the plaintiff's land was owing to any want of skill or care in making the enlargement, and was not the natural result of the work, if carefully done, the license would not

constitute a defense. A license to do an act cannot be held to screen the licensee from the consequences of carelessness or unskillfulness in the performance of the act."

Woodruff v. Beekham, 43 N. Y. Sup. Ct. 282 (1878).

Plaintiff licensed defendant to cut holes through the floors and ceilings of plaintiff's store for defendant's convenience. Plaintiff contended defendant did so negligently. The court said:

"But for all injury to the plaintiffs' goods beyond such as was necessary in a careful and prudent opening of the apertures, if the jury found there was a license, the plaintiffs are entitled to recover.

Keithley v. Hettinger, 133 Minn. 36, 157 N. W. 897 (1916).

The defendant was licensed to use a house which was destroyed by fire. The plaintiff alleged negligence on the part of the licensee. The court said:

"One who is upon the premises of another as a licensee is not liable for the damages caused by a fire which occurs, without negligence on his part, while he is occupying the premises as such licensee. St. P. F. & M. Ins. Cr. v. G. N. Ry. Co., 116 Minn. 397, 133 N. W. 849. In the case cited a party of surveyors, employed by a railroad company, camped near a barn with the consent of the owner but without giving any consideration for the privilege. One of the tents contained straw for beds and an airtight sheet iron stove. A member of the party built a fire in the stove and then went away and left the tent unoccupied. About ten minutes later the tent was found on fire, and the fire was communicated to the barn and destroyed it. It was insisted that lia-

> bility for the loss existed without proof of negligence, but the court held otherwise. The court further held, however, that while the facts did not establish liability as a matter of law, they made a case for the jury on the question of negligence."

Sayles v. Bemis, 57 Wis. 315, 15 N. W. 432 (1883).

The plaintiff, a woman, sued the defendant for negligent exercise of a license. The court said:

> "If he had the right to draw his wood across the plaintiff's land under a license given by her or her authorized agent, such license would probably include a license to take down so much of the fence on her west line as was necessary to perform such work. In such case taking down the fence would not be a wrongful act; and in such case, if the defendant could be made liable at all for the escape of the plaintiff's cow through the opening in the fence made by him for the purpose of drawing his wood, he could only be held liable on the ground that he carelessly and negligently left the fence open when not engaged in drawing such wood."

The County may not avoid liability by urging that others did the wrong. Petitioner knew that the County had to have others do the work. This usually is true. It is the only way a County can function but the County is primarily liable to the land owner.

From common experience we know a land owner is oftentimes willing to give a license to a well known and responsible person or corporation but would be wholly unwilling to entrust that same license to an unknown or irresponsible person. This is but another way of saying a license in real estate is a personal privilege to be en-

joyed only by the person to whom the landowner is willing to entrust the right.

When petitioner gave the license to Shelby County it did so because of the confident belief Shelby County, the licensee, its agents and servants, would fill the gully in a careful manner. If it failed to do so and was negligent the petitioner knew it was dealing with a financially responsible body which could respond in damages.

20 Corpus Juris, Sec., p. 1037.

> "Where a county has lawfully obligated itself to do certain things or to cause them to be done it is immaterial, to the other party's right to recover, whether the county itself failed to do the acts or whether it failed to have them done by a state agency."

Foster v. Lake County, 132 Ore. 374, 284 Pac. 830 (1930).

Landowner granted county right of way for state highway through his farm with provision that county would maintain fences along the same. Landowner sued county for breach of contract because of failure to maintain gates and fences, resulting in the loss of cattle. There was judgment for plaintiff.

Under Oregon law, control of the highway passed to the State Highway Commission after county provided the right of way. The County defended the action on the ground that its negligence was not responsible for the loss of cattle, but the negligence was that of the State Highway Commission. The court held this did not relieve the County of its obligation and stated:

> "We are not dealing with the authority of the county court or of the State Highway Commission

in the construction of the road, but with a contract which the county entered into in which it obligated itself either to do the acts agreed to or to cause them to be done, and hence it is wholly immaterial, so far as plaintiff's rights are concerned under the contract, whether the county failed to do the promised acts itself or failed to cause the acts to be done by the State Highway Commission, it having obligated itself that the acts would be done, and, the contract having been breached, **regardless of whoever may be responsible therefor,** the county is liable under its contract for all damages resulting to plaintiff by reason of its own breach of the contract."

THE GENERAL CONTRACTOR.

The general contractor was the agent, servant and representative of the County to fill the gully as it contracted to do. True the contract was with the United States, but the entry into the gully was pursuant to the license to the County. The general contractor did not enter the picture until May, and this was months after the grant of the license and easement.

The general contractor directed the entry into the gully by the sub-contractor. Both acted pursuant to the license and were necessarily agents of the County.

The general contractor may not shelter itself from liability by saying the sub-contractor was an independent contractor and thus set up an entirely new relationship between petitioner and the agents and servants of the County to which the petitioner has never consented.

Principles governing general contractors and their substitutes have no application in such a situation.

This principle is well illustrated by the following two cases:

Railway Co. v. Beatty, 5 Tenn. Civ. App., 186.

The landowner executed a deed for a railroad right-of-way through the farm.

Among other things, it was agreed:

> "Said railroad company further agrees and binds itself to so construct its road as not to interfere with the spring on said farm, said spring being commonly known as 'Spout Spring'."

The spring was outside of the railroad right-of-way.

The railroad let the contract to a general contractor which in turn made a sub-contract with an independent contractor.

It became necessary for the sub-contractor to procure a certain kind of rock suitable for mixture with cement in the making of pillars. The sub-contractor blasted rock of this character from the right-of-way with the result the spring was destroyed.

The landowner sued the railroad. The court said:

> "The trial Judge was of opinion that under the contract between the railroad and defendants in error, the railroad was liable for any damages that might be occasioned to the spring by anyone engaged in the construction of the road for plaintiff in error. This, it is insisted, was error for two reasons: First, that the sub-contractor, Maloney-Seymour Company, occupied the relation of independent contractor; • • •
>
> "The construction given the contract by the trial Judge was right and proper. Under that contract

> the railroad bound itself and in no uncertain terms and without any conditions to so construct its road through the Beatty farm as not to interfere with or damage the spring. Under this contract, it matters not whether the road was constructed by the railroad or by contractors or sub-contractors. The contract obligated the railroad to safeguard the spring in the construction of its road, no matter how or by whom the road was constructed. **This contract takes the case out of the doctrine of independent contractor, and it has no application to this case.**"

The damage to the spring was occasioned by the blasting by the sub-contractor on the right-of-way belonging to the railroad company.

Where one is obligated by contract to protect property, the obligation cannot be avoided by saying that the wrongful act was done by an independent contractor.

> Ruehl v. Telephone Co., 23 N. D. 6, 135 N. W. 793, L. R. A. 1918C, 1063.

The telephone company contracted for one Zimmerman to dig a number of telephone post holes. One of the holes was dug in the plaintiff's front yard. After Zimmerman dug the hole, he left it unprotected with the result that the plaintiff's very small child fell into it and was suffocated. The plaintiff sued the telephone company, which defended on the ground it was not liable for the act of Zimmerman as he was an independent contractor. The court said:

> "The defendant cannot, under these facts, escape liability on the theory that Zimmerman was an independent contractor."

Also:

> "Nearly all of the writers, however, agree that, where a person or corporation undertakes **to do work upon the premises of the owner,** or of him who is in possession, and such first person intrusts the performance of the work to a contractor or workman, but does not, and is not authorized by the one in possession to, give the control of the premises to the workman or contractor, such workman or contractor, **will be looked upon as the servant of the first party, and not as an independent contractor.** In other words, the courts are inclined to hold, and we hold in this case, that when the telephone company undertook to put the telephone in the house of Louis Ruehl **it impliedly agreed to put it in in a safe and proper manner and not in a manner which would endanger the lives of the plaintiff and his family.**"

The general rule is stated in 27 Am. Jur.—Independent Contractors, p. 525:

> "Under some circumstances, duties are imposed upon an employer which he cannot delegate to another; and where this is the case, he is liable for their nonperformance even though he employs an independent contractor to perform the actual work. Thus, if a statute or municipal ordinance requires a person to take a certain precaution when work is being done, and such precaution is not taken, it is no defense that a contractor was employed to do the work and that the failure to take the precaution was due to the contractor's negligence. Likewise, one who, by a specific agreement, undertakes to do some particular thing, or to do it a certain manner, cannot, by employing an independent contractor, avoid responsibility for an injury resulting from the nonperformance of any duty or duties which, under the express terms of the agreement or by implication

of law, are assumed by the undertaker. This doctrine has been applied with reference to many kinds of agreements. Under this principle, a municipality is bound to exercise a certain degree of care to keep its highways in repair even though a contractor is working thereon, and a railroad or other corporation given a franchise for certain purposes cannot delegate to another the use of the franchise so as to relieve itself from its obligations to the public.

We submit the general contractor was the agent of the County pursuant to the license and is liable for the acts of the sub-contractor which entered the gully as directed by the general contractor.

"NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION."

If petitioner is to be denied the right to hold the County on neither the contracts nor tort its property has been taken by a public body for public use without just compensation. The requirements of just compensation can't be fulfilled by relieving the County and substituting an unsatisfactory cause of action against an irresponsible sub-contractor.

Constitution of the United States, Fifth Amendment.

"Nor shall private property be taken for public use, without just compensation."

Constitution of Tennessee, Article I, Section 17:

"That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, **shall have remedy by due course of law**, and right and justice administered without sale,

denial, or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct."

Constitution of Tennessee, Article I, Section 21:

"That no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without just compensation being made therefor."

Damage to property is an appropriation.

Pumpelly v. Green Bay Co., 80 U. S. 166.

A dam was erected across a river causing the plaintiff's lands to be overflowed and damaged. The State of Wisconsin, by statute, authorized the construction of the dam for improvement of lands, etc. The plaintiff sued and recovered. This court said:

"The argument of the defendant is that there is no taking of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict

irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretense of the public good, which had no warrant in the laws or practices of our ancestors."

Shelby County v. Dodson, 13 Tenn. App. 392 (1930).

Improvement by a county of a public road resulted in an impairment of the plaintiff's ingress and egress to his property. Plaintiff recovered damages. The court said:

"We are of the opinion that when a county exercises its authority to construct highways or to improve highways, or rebuild highways, that results in actual damage to the abutting property, that it constitutes a taking of the property to the extent that it renders the property less desirable and less valuable. We are further of the opinion that to constitute a taking of property it does not become necessary to show that there was property actually taken and appropriated for public use. It is sufficient that if in the course of constructing the new improvement and by which the owner of the abutting property suffers a damage to his property as a direct result of making the public improvement that it constitutes a taking of the property in the sense that the owner is entitled to be compensated by way of damages. We understand this to be the effect of the holding in the cases of Morgan County v. Goans, 138 Tenn., 382; Pierce v. Gibson County, 107 Tenn., 233; Hamilton County v. Rape, 101 Tenn., 222."

If Shelby County is immune, as the Circuit Court held, from suit for damage to petitioner's property taken for public County purposes there is a violation of this Constitutional prohibition.

SHELBY COUNTY IS LIABLE FOR NEGLIGENCE AND DAMAGES WHEN ENGAGED IN A GOVERNMENTAL FUNCTION AND THERE IS A DEPARTURE FROM COUNTY PROPERTY AND A WRONG TO PRIVATE PROPERTY.

Laying aside momentarily all questions of contract petitioner insists it has a cause of action against the County for tort.

Petitioner admits the general rule that the County is not liable for negligence in the performance of a governmental function such as repairing roads, maintaining and operating public buildings, etc.

In Tennessee there is a well recognized exception that the County is liable if engaged in a governmental function and there is a departure from County property and a wrong to private property.

Petitioner relies upon the exception to hold the County liable in tort even tho the construction of the levee and the filling of the ditch were in the discharge of public duties.

Chandler v. Davidson County, 142 Tenn. 265 (1919).

A roadway was under repair by Davidson County. A ditch or excavation nine feet long, four feet wide and three and one-half feet deep was made **beyond the limits**

of the public roadway and "was in or near the front entrance to the home of W. S. Noble, near the City of Nashville."

The plaintiff, at night, fell in the ditch and was injured, brought suit and recovered. The Supreme Court of Tennessee affirmed.

> "These cases all hold that the county is not liable in tort for negligence of its agents in the discharge of their public duties upon the thought that there is no statute making it so liable, and the liability does not exist at common law, because of the limited nature of the corporate character of the county. It is not a general corporation, and is not organized for the purpose of exercising fully the functions of government. Its governmental capacity is much limited, and it exercises such powers of government as it has by virtue of the statute.
>
> "But such is not the question involved herein. Its nonliability for misfeasance of its agents is conceded by plaintiff, but it is insisted that the county, as a legal entity endowed by the legislature with power to build roads, is not authorized to commit a nuisance either public or private. We think this is true, and we also think that the condition created by the construction of the ditch as described herein is a nuisance as it stands.
>
> * * * * *
>
> "The law would be inadequate in this situation to permit the county to construct the road and hold it immune from responsibility for creating and maintaining a nuisance. **It cannot erect a nuisance upon the property of a citizen so as to deprive or impair the use of such property.**
>
> "In this case the nuisance consists of the construction and maintenance of the ditch and not of building the pike. Building the pike is one of the

corporate functions of defendant, and is authorized by statute. Constructing the ditch so as to obstruct the ingress and egress of plaintiff to the premises of her host, and maintaining the ditch as it was maintained, is the actionable nuisance from which plaintiff has a cause of action."

The Circuit Court decided the exception announced above is bad law and stated that it has been "impliedly overruled." Such is not the case. It remains today the law of Tennessee without equivocation and has recently been cited as current law of Tennessee.

Love v. Nashville Agricultural and Normal Institute, 146 Tenn. 550 (1921).

This is sewage case in which the landowner was damaged and recovered because of seepage on to his lands.

"In **Chandler v. Davidson County,** 142 Tenn., 265, 218 S. W., 222, it was held that a county, although not liable for misfeasance of its agents, is not authorized to commit nuisance, either public or private. It was said that while a county is not liable for negligence of agents in the discharge of their public duties because there is no statute making it liable, and none exists at common law, because of the limited nature of the corporate character of the county, nevertheless the county was held liable where in constructing and repairing a road its commissioners and superintendents created a nuisance as a result of which a pedestrian was injured. Any number of cases might be cited in support of the proposition that while an arm of the government exercising governmental functions, cannot be held liable for the negligence of its agents, nevertheless it cannot create and maintain a nuisance, and is liable for damages incident thereto. If the creator, the government, is not immune, why should one of its creatures be?"

Carothers v. Shelby County, 148 Tenn. 185 (1922).

Recovery was denied for negligence of county in maintaining a public bridge which collapsed.

> "A demurrer was interposed, and sustained by the circuit judge upon the ground that Shelby county is an integral part of the State, and neither it nor its officers can be subjected to actions of tort for failing to properly exercise a purely governmental function or duty, such as the construction and maintenance of roads and bridges.
>
> "It is urged that this was error, and in support of the insistence **Chandler v. Davidson County**, 142 Tenn., 266, 218 S. W., 222, is relied upon.
>
> "Confusion as to the rule applied in the Chandler case arises from a failure to observe the facts of the case and the language of the opinion, which distinguishes between negligence, an omission of duty, and a nuisance, or **active wrong**. The court held in the Chandler case:
>
> "The nuisance consisted in the construction and maintenance of a ditch, **apart from the road**, and not in the building of the road. Building the pike is one of the corporate functions of the county, and is authorized by the statutes. Constructing a ditch so as to obstruct premises, and constitute danger to people is the actionable nuisance.
>
> "The nuisance is not a mere omission of duty by the county while exercising the delegated sovereign power of maintaining roads and bridges, **but an active continuing wrong beyond the scope of that power.**"

We understand the Chandler case to mean the county is liable when, in the pursuit of a public duty, it leaves public property and does an affirmative but negligent act on private property. It is the effective and current law of the State as manifested by repeated citations thereof in recent decisions.

Vance v. Shelby County, 152 Tenn. 141 (1925).

The County was sued for negligence in the maintenance of a bridge on a public road.

The court held that a county is not liable for negligence in the condition, use and management of public institutions and property. The court said:

> "The contention of plaintiff that the instant case falls within the rule announced by this court in **Chandler v. Davidson County**, 142 Tenn., 266, 218 S. W., 222, is not well grounded. In that case the nuisance consisted in the construction and maintenance of a ditch, **apart from the road**, and not in the building of the road.
>
> "In discussing the rule announced in Chandler v. Davidson County, supra, in Carothers v. Shelby County, 148 Tenn., 185, 253 S. W., 708, the court said: 'Confusion as to the rule applied in the Chandler Case arises from a failure to observe the facts of the case, and the language of the opinion, **which distinguishes between negligence, an omission of duty, and a nuisance, or active wrong.**'
>
> "The court held in the Chandler Case that the nuisance complained of, and out of which the injuries to the plaintiff in that case grew, consisted in the construction and maintenance of the ditch, **apart from the road**, and not in the building of the road.
>
> "The creation of a nuisance is not a mere omission of duty by the county while exercising the delegated sovereign power of maintaining roads and bridges, but **is an active continuing wrong beyond the scope of that power.**"

Johnson v. Hamilton County, 156 Tenn. 298 (1927).

The county was sued for negligence in the operation of an insane hospital. Recovery denied.

> "The plaintiff in error seeks to bring the case within the rule of **Chandler v. Davidson County**, 142 Tenn., 266. This cannot be done. By no stretch of the imagination can it be said that the presence of a razor blade in the cell of an insane patient is a defect in the construction of the building prepared by the County for such patients. Moreover, there is nothing in **Chandler v. Davidson County**, supra, which would support a holding that a County, maintaining a hospital for the benefit of its citizens who might become insane, would be liable in damages for an injury caused by a defect in the construction or maintenance of the building."

Lee v. Davidson County, 158 Tenn. 313 (1928).

The plaintiff stepped in heated tar on the highway and sued. Recovery denied.

> "This general rule of non-liability for damages while engaged in the exercise of a governmental function is, of course, too well settled to require discussion. It has been reaffirmed in our recent cases. Vance v. Shelby County, relied on for appellant, 152 Tenn. 141; Carothers v. Shelby County, 148 Tenn., 185; Johnson v. Hamilton County, 156 Tenn., 298. And even in **Chandler v. Davidson County**, 142 Tenn. 265, wherein liability for creating and maintaining a nuisance was adjudged, it was said that 'building the pike,' and equally repairing it, 'is one of the corporate functions of defendant, and is authorized by statute.'
>
> "The facts of the present case do not bring it within the exceptional nuisance doctrine. Analysis of the declaration discloses no more than negligent conduct incident to and in the direct course of the performance of the statutory duty of maintenance

of the highway. And, while mere negligence in the manner of the performance would not give rise to liability under the rule, it is not shown that the manner of this performance was materially unusual or, indeed, unnecessary. In substance, the negligence alleged consisted in a failure to give adequate warning to plaintiff as he approached of the dangerous conditions which he encountered."

City of Murfreesboro v. Haynes, 18 Tenn. App. 653 (1935).

The City built a plant outside the corporate limits for the disposal of sewage. Drainage therefrom damaged adjacent landowners, who brought suit. There was a recovery.

Among other things, the court said:

"It is well settled that a municipality or county, in the construction of a public work, is not privileged to commit a nuisance, to the special injury of the citizens, and for such act is liable to a private individual in damages. Pierce v. Gibson County, 107 Tenn., 224, 64 S. W. 33, 55 L. R. A., 477, 89 Am. St. Rep., 946; Chattanooga v. Dowling, 101 Tenn., 342, 47 S. W., 700; **Chandler v. Davidson County**, 142 Tenn., 265, 218 S. W. 222; Kolb v. Knoxville, 111 Tenn., 311, 76 S. W., 823."

Odil v. Maury County, 175 Tenn. 551 (1939).

A school building basement was entered by a concrete ramp, unprotected by a guard rail. A child was injured and the County was sued. The court held there was no liability because "under the decisions of our courts, the County in the operation and maintenance of its schools is engaged in a governmental function." The court said:

"**Chandler v. Davidson County,** 142 Tenn. 265, 218 S. W. 222, is not in point. The substance of the

holding in that case, as interpreted in Carothers v. Shelby County, supra, and Vance v. Shelby County, supra, is that where the county departs from the delegated sovereign power of maintaining and repairing roads and bridges and creates a nuisance that results in injury, it thereby commits an actionable wrong beyond the scope of its authority and power."

The next two cases are those cited by the Circuit Court for its conclusion that Chandler v. Davidson County, supra, has been overruled. Such a conclusion is, we respectfully submit, a grievous error. Both cases deal with the County's negligence in maintaining its public property and do not deal with an affirmative and negligent act of the county on private property.

Fryar v. Hamilton County, 160 Tenn. 216 (1929).

The plaintiff sued for damages to his land because of the county's failure to keep open the ditches on the highway resulting in concentration of water on plaintiff's land. Recovery denied.

"The theory upon which the declaration proceeds is that the defendant negligently created and maintained a situation along the highway that constituted a nuisance. The facts presented by the declaration disclose a failure to keep open ditches and drains **which are an adjunct to the road** and **not separate from it**. The facts shown in the declaration do not bring the case within the rule of **Chandler v. Davidson Co.**, 142 Tenn. 266. See, also, Carothers v. Shelby Co., 148 Tenn., 186. At most the declaration charges an omission of duty or act of nonfeasance.

* * * * *

"In the establishment and maintenance of roads, the County was exercising functions of the sovereign,

delegated by the State, and is not liable for the alleged injury. See Woods v. Tipton Co., 7 Baxt., 112; Carothers v. Shelby Co., supra; Vance v. Shelby Co., 152 Tenn., 141."

Scott v. Knox County, 166 Tenn. 585 (1933).

The plaintiff sued the county for negligence in the maintenance of a public road. For two or three years a bridge was down which resulted in injuries. Recovery denied.

"Knox county cannot be subjected to liability for either acts of omission or commission in the construction or maintenance of public highways and bridges, because the county acts as a political entity to facilitate the execution of powers delegated by the State and in that capacity cannot be sued for negligence. Vance v. Shelby County, 152 Tenn., 141, 273 S. W., 557; Lee v. Davidson County, 158 Tenn., 313, 13 S. W. (2d), 328; Carothers v. Shelby County, 148 Tenn., 185, 253 S. W. 708; Fryar v. Hamilton County, 160 Tenn., 216, 22 S. W. (2d) 353.

* * * * *

"The statements of the declarations do not bring the cases within the rule applied in **Chandler v. Davidson County**, 142 Tenn., 265, 218 S. W., 222. That case rests upon and must be confined to its peculiar facts and strained construction cannot extend its meaning. See Carothers v. Shelby County, supra. These cases cannot be drawn within the purview of the Chandler case by mere allegations that acts, which are in fact acts of omission or commission, amount to a nuisance."

The Circuit Court considers the rule in Chandler v. Davidson County extraordinary. It is the law of the other States of the Union. Whatever may be said it is the law of Tennessee.

This same county, Shelby County, earnestly endeavored a few years ago to persuade the Tennessee appellate courts that it is not liable for damages to private property resulting from the exercise of its governmental duties. Shelby County insisted vigorously upon immunity from suit whenever it is engaged in a governmental function even tho private property is damaged. The Tennessee courts repudiated the argument and recognized the exceptions to the general rule, just as the Circuit Court should have done in the suits at bar.

Shelby County v. Dodson, 13 Tenn. App. 392 (1930).

Improvement by the county of a public road resulted in an impairment of the plaintiff's ingress and egress to his property. Plaintiff sued for damages to his property and recovered. The court said:

> "It is sufficient that if in the course of constructing the new improvement and by which the owner of the abutting property suffers a damage to his property as a direct result of making the public improvement that it constitutes a taking of the property in the sense that the owner is entitled to be compensated by way of damages. We understand this to be the effect of the holding in the cases of Morgan County v. Goans, 138 Tenn., 382; Pierce v. Gibson County, 107 Tenn., 233; Hamilton County v. Rape, 101 Tenn., 222."

There is nothing unusual or strange about the law of Chandler v. Davidson County. For a long time before the decision it was the settled law of Tennessee that a county is liable for the invasion and damage to private property even though the county at the time was engaged

in a governmental function such as the construction of a Court House or a sewage disposal plant.

> Pierce v. Gibson County, 107 Tenn. 224 (1901);
> Chattanooga v. Dowling, 101 Tenn. 342 (1898).

The Circuit Court should be reversed.

THERE WAS SUBSTANTIAL EVIDENCE OF NEGLIGENCE BY THE SUB-CONTRACTOR TO WARRANT THE JURY VERDICT AND JUDGMENT BY THE DISTRICT COURT.

Petitioner admits that if a contract for public works is performed without negligence but will inevitably result in damage to or the taking of another's property, the contractor will not be liable for the damage. If, however, the damage is because of negligence the contractor is liable.

It can't be denied that all, the County, U. S. Engineers, general contractor, sub-contractor and petitioner, believed the fill of the gully and the dirt superimposed on the pipes would do no damage if done in a reasonably careful manner.

Before briefly alluding to the petitioner's evidence emphasis should be given here to the fact the sub-contractor offered absolutely no evidence that the weight of the dirt on the pipe caused the breaks in the pipe joints.

Petitioner admits the established rule that when all the inferences that justifiably can be drawn from the evidence do not constitute a sufficient basis for a jury verdict, the Court may direct the jury to return a verdict for the proper party. But there was direct and posi-

tive evidence coupled with many proper inferences to sustain the judgment.

Mr. Burke, petitioner's construction Superintendent testified that the four pipe lines and supporting structure were constructed in 1931. The lines were about three and one-half feet below the surface of the ground and emerged from the sides of the gully at approximately this distance below the ground surface. The supporting structure consisted of three concrete longitudinal beams, 11 inches by 18 inches, reinforced by six steel bars, one and one-quarter inch, spaced evenly in the beams. The ends of the beams extended about 12½ feet into the gully banks and rested on solid earth. Between the center and south beam there was a transverse beam of like construction. The pipes spanning the gully rested on the transverse beam so supported by the center and south longitudinal beams. The center and the north longitudinal beams supported a deck bridge used by automobiles and small trucks. At the point where the beams entered the gully banks there were upright posts 14 x 14 inches with mud sills underneath (R. 179-182, 102, 135). The distance between the longitudinal beams was 5 feet (R. 145). Mr. Burke also testified that this structure was very well constructed. Sixty or ninety days before the loss of the gasoline, Mr. Burke visited the Memphis terminal, examined this structure and testified that it was in excellent condition (R. 187).

Captain Meyer of the United States Engineer Corps, in charge of the levee project, daily visited the scene of the work from the time the contract was let in May, 1939, until it was completed (R. 213).

Captain Meyer stated in emphatic and plain terms that the weight of the dirt superimposed upon the pipe lines and beams did not cause the damage.

> "Q. 62. That question is intended to ask you if the ditch was filled to the point of covering the ditch in its entirety and carrying the fill to an elevation of three feet above the pipe—then would the weight of the dirt superimposed upon the pipe cause, in your opinion, the damage to the pipe and the supporting beams as I have described it?
>
> * * *
>
> "The Witness: Assuming the pipe and beams were in sound condition, or in the absence of any unknown external condition, my opinion is that the load of the dirt above the pipe in itself would not cause damage."
>
> R. 217, 218.

The Circuit Court discarded this testimony as Captain Meyer on cross-examination admitted that he didn't get down into the gully and examine the structure. Certainly a United States Army Engineer in charge of the project who saw this structure hundreds of times and was the supervising officer for the United States for the project is qualified to offer an opinion of probative value, even if he didn't get down in the gully to examine the structure and even if he admitted "he was not a pipe line expert."

The Circuit Court dismissed Captain Meyer from the record with these words:

> "These concessions completely destroy Captain Meyer's opinion evidence as tending to support an inference that some act or condition other than the weight of the dirt caused the break in the pipe joints."

Counsel for the sub-contractor, on cross-examination of Captain Meyer, asked him numerous questions about the kind and character and makeup of the beams. The Captain answered the questions accurately, showing that he had a clear conception of the structure and its probable strength (R. 218).

The sub-contractor's employee who operated the bull-dozer, which weighs around fifteen tons and moves three to five yards of dirt, a yard weighing from twenty-five hundred to twenty-eight hundred pounds, admitted that he pushed the dirt over the pipes and structure from the north side until the dirt fill covered the pipes and structure to a depth of two or three feet (R. 98, R. 306, R. 366).

The employee further admitted that he drove this heavy piece of machinery upon the structure. He stated:

> "Q. Was it necessary for you to cross over the northern-most beam which had formerly supported the wooden structure (meaning the deck bridge) in order to fill under and over the pipes themselves?
> "A. Yes, sir."
>
> R. 311.

There were no pipes between the north and the center beams. The plain inference from his testimony is that as he worked from the north, across the north beam and reached the center beam which, with the south beam, supported the pipes, he drove the tractor upon the center beam, "in order to fill under and over the pipes themselves."

Because counsel for petitioner inadvertently stated in the Circuit Court brief that it was not difficult "to

imagine and assume that he drove the machine against and upon the other beams and pipe lines" instead of being somewhat more specific, the Circuit Court discarded this evidence by saying:

> "Imagining or assuming that the weight of the machine on the north beam injured the pipe line, is clearly a non sequitur and does not arise to the dignity of inference."

The testimony is of such a nature that an inference is not necessary, but if necessary to give value to this testimony, clearly the inference is justifiable.

One of the sub-contractor's witnesses, a civil engineer and a graduate of West Point, testified that the use of a bulldozer shoving the dirt over the pipe lines and structure was not the careful and proper manner of doing the work (R. 345).

The weight of the dirt did not cause the damage. The pipe joints at the west side of the gully were broken, while those on the east side were not broken (R. 147).

After the damage Shelby County excavated the pipes (R. 112). The same kind of screw flange joints were used to replace those broken (R. 153). They were in substantially the same location as prior to the damage (R. 155). Since the replacements there has been no trouble (R. 156).

To lend further support to the petitioner's contention that there was substantial evidence of negligence, this court's attention is directed to the fact that the general contractor and sub-contractor were represented by the

same counsel, and the two contractors were co-operating to defeat petitioner's claims. This is not objectionable, but the general contractor admitted on cross-examination that immediately after the damage to the structure he employed a Mr. Hidinger, a well known engineer in Memphis, to make an examination and report, which the contractor and his counsel did not produce in court (R. 241). That witness and his report were available to both contractors, but they preferred not to call him. Such conduct gives rise to the justifiable inference that Mr. Hidinger would have testified just as Captain Meyer testified.

Stewart, Admr. v. Southern Ry. Co.....U. S.....
(February 16, 1942).

Mr. Justice Black stated that in his opinion the plaintiff's judgment should be affirmed. The case involved the Safety Appliance Act and a defective coupler.

> "Moreover, since there was a statutory duty not to continue using this particular pin lifter, if it was defective, we can reasonably assume that the railroad's inspectors made some examination of it. **Yet no inspector nor anyone else was called by the railroad to give testimony on the condition of the pin lifter immediately after the accident.** Under these circumstances, reasonable jurors are not to be denied the right to make inferences which other reasonable people would make."

While irrelevant to the point now being discussed, we cannot refrain from quoting these words, always so applicable in an appeal from a jury verdict. The same Justice stated:

> "Because it must rely on the written page rather than living words, an appellate court can never fully

appreciate the effect of testimony heard by a jury of local citizens."

Fisher v. Insurance Co., 124 Tenn. 450 (1911).

"'The failure to call an available witness possessing peculiar knowledge concerning facts essential to the party's cause, direct or rebutting, or to examine such witness as to the facts covered by his special knowledge, especially if the witness be naturally favorable to the party's contention, relying instead upon the evidence of witnesses less familiar with the matter, gives rise to an inference, sometimes denominated a 'strong presumption of law,' that the testimony of such uninterrogated witness would not sustain the contentions of such party to the suit.'"

The District Court recognized the importance to be attached to inferences and charged the jury:

"It is a well-settled rule of evidence that when the circumstances in proof tend to fix a liability on a party who has it in his power to offer evidence of all the facts as they existed, and rebut the inferences which the circumstances in proof tend to establish, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would support the inference against him, and the jury is justified in acting upon that conclusion."

R. 378, 379.

A final argument to sustain the judgment is the doctrine of "res ipsa loquitur."

Sweeney v. Erving, 228 U. S. 233.

The plaintiff sued a doctor for x-ray burns. This court said:

> "* * * In our opinion, res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff."

Petitioner admits the burden of proof is upon it to show negligence, but earnestly insists that if all of the oral evidence above mentioned were discarded, the excellent condition of the structure and the subsequent events and circumstances were such as to cast upon the sub-contractor the duty of going forward with the evidence to rebut the inference of negligence which the circumstances warrant. This doctrine of res ipsa loquitur is often applied in the Tennessee courts.

Granert v. Bauer, 17 Tenn. App. 373.

> "Where the thing which caused the injury complained of is shown to be under the management of defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

Oliver v. Union Transfer Co., 17 Tenn. App., 697.

> "The inference drawn under the doctrine of res ipsa loquitur is substantive evidence, and in the absence of rebutting evidence or when rebutted by substantive evidence, it creates an issue for the jury."

We respectfully submit for the many reasons stated that the Circuit Court erred in reversing the judgment against the sub-contractor.

The judgments dismissing Shelby County and the general contractor should be reversed.

Respectfully submitted,

EDWARD P. RUSSELL,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE [illegible]

October Term, 1924.

GULF REFINING COMPANY,

Petitioner,

vs.

MARK O. WALKER & SON COMPANY, HARTFORD ACCIDENT & INDEMNITY COMPANY, and COUNTY OF SHELBY, TENNESSEE,

Respondents.

PETITION OF [illegible] FOR WRIT OF [illegible] TO REVIEW DECREE OF [illegible] IN CAUSE OF MARK O. WALKER & SON COMPANY, AND BRIEF IN SUPPORT THEREOF.

T. E. GAILOR,
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Shelby County,

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Memphis, Tennessee
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1941.

GULF REFINING COMPANY,
Petitioner,

vs.

MARK C. WALKER & SON COMPANY, HARTFORD ACCIDENT & INDEMNITY COMPANY, and COUNTY OF SHELBY, TENNESSEE,
Respondents.

No. 1114.

RESPONSE OF SHELBY COUNTY TO PETITION FOR WRIT OF CERTIORARI OF MARK C. WALKER AND SON COMPANY, AND BRIEF IN SUPPORT THEREOF.

STATEMENT OF THE CASE.

This Petition for Certiorari involves two separate and distinct law suits, one of which originated in the Federal Court and the other in the State Court at Memphis, Shelby County, Tennessee.

This respondent, Shelby County, is a party to and interested in only the suit which was brought against it in the Federal Court,—*Gulf Refining Company vs. Mark C. Walker & Son Company,* No. 1114 in this Court.

This respondent was dismissed by the Federal trial judge and that Order of Dismissal was affirmed by the Circuit Court of Appeals.

There was, therefore, a concurrent finding of the Federal trial judge and the Circuit Court of Appeals that Shelby County was not liable in this law suit.

This Petition for Certiorari sets out no new grievance whatever so far as that concurrent dismissal is concerned. It merely rehashes grounds presented to the Court of Appeals and which were held by that Court as insufficient and unavailing.

The most liberal extension of the language of Section 240 of the Judicial Code, upon which petitioner relies for the jurisdiction of the Supreme Court, does not give the Supreme Court jurisdiction to review the decree in case No. 1114,—the only case with which this respondent is concerned.

The Federal question of the violation of the Seventh Amendment to the United States Constitution is confined to case No. 1115 in which this respondent is not a party and has no concern.

The filing of a Petition for Certiorari in both cases (1114 and 1115) for the decision of a Federal question which has arisen in only one of them (1115), is an improper attempt to secure a review of a concurrent opinion of the Federal Trial Court and the Court of Appeals in case No. 1114, for which Section 240 of the Judicial Code furnishes no authority whatever.

The separate decrees entered in the two cases in the Court of Appeals are independent of one another and the review and redress of one of them does not necessitate any consideration or review of the other.

The reasons relied on for the allowance of the writ as against this defendant and to which this response will be confined are found on pages six through eight of petitioner's Brief and are numbered II, III, IV, and VI.

In the original and amended complaints (R. p. 5, p. 38) the petitioner without making an election, sought to hold Shelby County liable in damages both for breach of contract and for negligence in tort.

(1) The liability of the County for breach of contract is based on

(a) The alleged breach of a covenant in a formal easement deed given by Gulf Refining Company to Shelby County and its assigns on the fourteenth day of February, 1939 (R. p. 11), "that proper and adequate provision shall be made for the continued use of the existing pipe lines."

(b) The alleged unauthorized assignment of rights given personally to the County in a letter of March 11, 1939, from R. W. Lynch, Petitioner's Superintendent, to William B. Fowler, City Engineer (R. p. 40). *The letter is addressed to the City Engineer and the County is not mentioned in it.*

(2) The theory on which petitioner charges the County with liability in tort for negligence is that

(a) "The County is liable for negligence when engaged in a governmental function and there is a departure from County property and a wrong to private property." (Br. p. 11). Until the decision of this case in the Court of Appeals, petitioner had insisted that the County's participation in the work involved in this litigation was a non-governmental undertaking. This position seems to have been abandoned by petitioner as untenable.

(b) By the Federal Flood Control Act, 33 U.S.C.A., par. 701 c, which is made a part of the Original Complaint, it was provided that for the control of the flood waters of the Mississippi River, if Memphis and Shelby County would, without expense to the United States Government, furnish the necessary easements and rights-of-way and give assurance to the Government that the title to the easements and rights-of-way were good, and agree to indemnify the Government against claims arising against defects in title, that the United States Government, acting by and through its Corps of Engineers and in accordance with plans to be made by them, would construct wholly at the expense of the United States Government, levees, pumping stations, flood walls, floodways, dams, and other works for flood control.

The City of Memphis and County of Shelby agreed to cooperate and to furnish easements and rights-of-way for the Federal Flood Control Project on Nonconnah Creek south of Memphis and on Wolf River north of Memphis and to that end sought and obtained authority from the Legislature of the State of Tennessee for bond issues and the levy of taxes for the expense to the County and City of these improvements. These enabling Acts for the Project are Chapters 534 and 897, Private Acts of Tennessee, 1937.

The County and City obtained the necessary easements and rights-of-way, gave the necessary assurance to the United States Government, which proceeded to accept these easements and rights-of-way and in accordance with plans and specifications of the United States Corps of Engineers, let contracts for the construction of levees and other Flood Control Projects.

One of the easements obtained was that of the Gulf Refining Company, which was in the form of a deed from the Company to Shelby County, covering the land of the Company on which the levee would be built and containing covenants for rights of ingress and egress and of indemnity and release to Shelby County, its successors and assigns, from any and all damages by reason of constructing the levees, flood walls, and appurtenant structures, and the exercise and use of rights conveyed in the easement. The consideration for the easement granted was One ($1.00) Dollar, the construction and maintenance of the levee, proper and adequate provision for continued use of existing pipe lines, reversal of drainage, and the erection and maintenance of a private road across the levee. (R. p. 11)

Almost a month after the giving of the original easement in March, 1939, Petitioner's Superintendent Lynch wrote W. B. Fowler, City Engineer, a letter confirming a conversation in Fowler's office and giving permission of the Gulf Refining Company to fill a ditch on its property to protect the proposed levee. (R. p. 40.) This letter was asked and given, according to Lynch and Fowler's testimony, because the United States Engineers had decided that to protect the levee the filling of the ditch had to be included in the work for which the Engineers were

letting contracts, although it was not contemplated when the original easement was obtained.

The damage to the pipe lines was done to them where they crossed the ditch and was not done to them on land covered by the original easement.

The County was dismissed on the Original and Amended Complaint before the trial and, therefore, no witnesses were introduced on behalf of the County at the trial nor was the County represented at the trial. On April 6, 1940, a judgment was entered against Weaver, the subcontractor, for nine ($9,000) thousand dollars.

BRIEF AND SUMMARY.

1. **Shelby County is not liable for breach of contract** either on

(a) the covenant in the easement of the 14th of February, 1939, "that proper and adequate provision shall be made for the continued use of the existing pipe lines" because such proper and adequate provision *was* made in the plans for the new levee.

In its opinion (R. p. 426) the Court of Appeals said of this covenant, "To read into it a general guarantee against damage would be in conflict not only with the general tenor of the agreement and with the specific release and acquittance of the County therein contained, but would raise a serious question as to the authority of the County to undertake such obligation."

Petitioner in his Brief, at the bottom of page 25, by quoting only part of the foregoing paragraph of the

opinion, gives an entirely erroneous impression of the holding of the Court of Appeals;

(b) on the letter of March 11, 1939, from R. W. Lynch, petitioner's Superintendent, to William B. Fowler, City Engineer, because

(1) This letter was a supplement to the contract set out in the easement and governed by all its terms and conditions;

(2) This letter does not give a personal license to *Shelby County* because it is addressed to William B. Fowler as *City* Engineer;

(3) Because it is to be construed with the formal easement which is made to Shelby County and its *assigns*, with covenants to Shelby County and its *agents*, for ingress and egress, and for release and acquittal of all claims for damages growing out of the construction of the levee;

(4) The formal easement expressly grants rights not only for the construction and maintenance of the main levee but for "additions thereto" and "appurtenant structures."

The Trial Court was justified in dismissing Shelby County on the complaint and amended complaint on the law but it would have been compelled to dismiss the County at the end of the Plaintiff's proof on the evidence

(1) because Shelby County took no part whatever in the construction of the levee or its appurtenances ex-

cept to acquire and transfer to the United States Government the necessary easements and rights-of-way;

(2) because neither under the Act of Congress authorizing the work nor under the work as it was actually done, did Shelby County or any of its officers or agents let any contracts for construction, exercise any supervision over the construction work or do any of it themselves.

(3) Because Plaintiff's witnesses, Lynch, its Superintendent, and Fowler, City Engineer, knew the function of the County at the time of the grant of the easement as well as at the time of the writing of the letter of March 11th. Both parties knew (R. pp. 125, 126, 202, 203), that the County would do no work and let no contract for the work.

(4) Both Lynch and Fowler testified that the letter of March 11th was asked for and given because "they" wanted to fill the ditch and these witnesses both definitely testified that "they" meant the United States Engineers. (R. pp. 125, 202.) *Shelby County was never mentioned.*

From the testimony of these witnesses of the Plaintiff it is quite clear that there was no difference between the letter of March 11th and the formal easement so far as the functions of the parties was concerned. Permission to fill the ditch was asked for and given as an integral part of the plans for the levee, and, as stated in the letter, for its protection. These two documents, the formal easement and the subsequent letter relating to the same subject matter, as indicated by the language contained in

them, are to be construed together and the letter limited and defined by the provisions of the easement.

Lynch v. Bank, etc. (Cal.) 37 Pac. 716;
17 C. J. S. 715;
6 R.C.L. p. 850, Sec. 240.

II. Shelby County is not liable in tort for the negligence of its officers, subordinate agents or independent contractors even though they be engaged in a private, unauthorized undertaking and commit an active wrong on private property.

Petitioner, in its Original Complaint (R. p. 9), made this statement of the proximate cause of the damage and the negligent acts which rendered the defendants, including Shelby County, liable,—"The work was done in such a negligent and careless manner that, unknown to the plaintiff, the pipe lines and the supporting beams were very greatly damaged, the pipe joints were broken and the concrete supports were likewise damaged and broken, which said damage and condition was due to the careless, negligent and inefficient manner in which the fill work was done and the heavy machinery was used in and about the said pipes and concrete foundations."

It has been repeatedly held by the Supreme Court of the State of Tennessee that the mere allegation that acts which are in fact acts of mere omission or commission, non-feasance or mis-feasance cannot be held to constitute a nuisance merely to bring them within the provision of the opinion in *Chandler vs. Davidson County* (1919), 142 Tenn. 265.

In the recent case of Scott v. Knox County (1933), 166 Tenn. 585 at page 588, the Court said, discussing the limits of the Chandler case:

> "That case rests upon and must be confined to its peculiar facts and a strained construction cannot extend its meaning * * * These cases cannot be drawn within the purview of the Chandler case *by mere allegations that acts, which are in fact acts of omission or commission, amount to a nuisance.*" (Italics ours.)

(a) Specifically and definitely under Chapter 897 of the Private Acts of 1937, this particular Flood Control Project on Nonconnah Creek, Wolf River and the Mississippi River, is made a governmental function for Shelby County and for it the County is authorized to issue bonds, levy taxes and exercise the power of eminent domain. Such projects are also made governmental functions for counties in Tennessee, under the Code of 1932, at Sections 4187, 4193, et seq.

(b) But even if the levee and the filling of the ditch were not a public improvement and an active wrong was done the Plaintiff by the negligence of the County employes or subcontractors, such employes or subcontractors might *themselves* be individually liable but *Shelby County* would not.

> "If the injury is a necessary incident of necessary blasting in construction of the highway, the damages are chargeable to the condemnor, here the County. But if the injury is not such a necessary incident, but is the result of negligence of the contractor, then the damages are chargeable to him."
>
> *Newberry v. Hamblen County*, 157 Tenn. p. 491, at p. 495.

"We are of the opinion that the failure of the officers and employees of the County, who, it is alleged, destroyed, or removed the bridge, from the road in question, to erect barriers or place lights or other warnings at the place where said bridge was removed for the protection of travelers, amounted to negligence, but such negligence did not render the county liable to Plaintiff for the injuries sustained under the authorities above cited."

Vance v. Shelby Co., 152 Tenn. 141, at p. 147.

"The demurrer of the County was on the ground that the negligence complained of was shown by the declaration to have been committed by an agent or employee of the County, for which the County is not liable. The Court was clearly correct in sustaining this ground of the demurrer in favor of the County."

Johnson v. Hamilton County, 156 Tenn. p. 300.

Neither the County nor its elected officers are liable for acts of subordinate officers:

Robertson v. Sichel, 127 U. S. 507; 22 R.C.L., pp. 487, 488;

Meacham on Public Officers, Sec. 598, 664.

There is no suggestion or even allegation that the damage to the pipes was a necessary incident of the building of the levee.

(c) The reasons given for this immunity of the County were set out in the case of *McAndrews v. Hamilton County*, 105 Tenn., p. 399, and have been many times approved by the Supreme Court of Tennessee:

"1. That there is no fund out of which satisfaction could be had.

2. That it is better that an individual should suffer than that the public should sustain an inconvenience.

3. That the County is a subordinate political governmental division of the State.

4. That its function or action in regard to such institutions are legislative, and that neither the State or County could be sued on such account.

5. That counties are instrumentalities of government and partake of the immunities of the State while acting in a governmental capacity."

These reasons leave no room for a distinction between the liability of a County for the negligent acts of its officers and agents in the performance of a governmental function and the negligent acts of such officers and agents in the performance of an unauthorized and non-governmental undertaking. If there is no County fund available for the satisfaction of a tort committed within the scope of the authority of the County officers, certainly there is no fund available for the settlement of judgments rendered against a county for the unauthorized and irregular acts of such officers. If it is better that an individual suffer in the one case, the reason holds for the other. If it is contrary to public policy for counties to expend tax money for judgments for damages, a fortiori, is it contrary to such public policy to pay damages accruing by reason of a non-governmental undertaking.

(d) The opinion of **Chandler v. Davidson County, 142 Tenn. p. 265**, is an anomaly, has never been followed in Tennessee since its rendition and was virtually overruled by the opinion in the case of **Fryar v. Hamilton County, 160 Tenn. 216**, which was rendered ten years later.

The authority of the Chandler case was pressed upon the Supreme Court in the following cases but was never followed in any one of them:

Carothers v. Shelby Co., 148 Tenn. p. 185;
Vance v. Shelby County, 152 Tenn. p. 141;
Johnson v. Hamilton Co., 156 Tenn. p. 300;
Odil v. Maury County, 175 Tenn. p. 550.

In the case of *Fryar v. Hamilton Co.*, supra, the Supreme Court virtually overruled the Chandler opinion:

> "The theory upon which the declaration proceeds is that the defendants negligently created and maintained a situation along the highway that constituted a nuisance. The facts presented by the declaration disclose a failure to keep open ditches and drains which are an adjunct to the road, and not separate from it. The facts shown in the declaration do not bring the case within the rule of Chandler v. Davidson Co., 142 Tenn. 266. See, also Carothers v. Shelby Co., 148 Tenn. 186. At most the declaration charges an omission of duty, or act of non-feasance."
> (160 Tenn. 216, at p. 218.)

(e) Of course, since the express allegation in this case of the *Gulf Refining Company v. Shelby County* is that an act or series of acts of negligence broke the pipes of the Company and since there is nowhere pleading nor proof that such acts were unauthorized or beyond the scope of the power of the County employes, or that this breaking of the pipes constituted a *nuisance* or created one, the facts of the Fryar case are identical with the facts of this case and the opinion of the Chandler case is inapplicable.

> "The nuisance is not a mere omission of duty by the County while exercising the delegated sovereign

power of maintaining roads and bridges, *but an active continuing wrong beyond the scope of that power.''*

Carothers v. Shelby Co., 148 Tenn. p. 185, at page 187.

''The creation of a nuisance is not a mere omission of duty by the County while exercising the delegated sovereign power of maintaining roads and bridges, but is an active continuing wrong *beyond the scope of that power.''*

Vance v. Shelby Co., 152 Tenn. 141, at p. 147.

''These cases cannot be drawn within the purview of the Chandler case by mere allegations that acts, which are in fact acts of omission or commission, amount to a nuisance.''

Scott v. Knox Co., 166 Tenn. 585, at p. 588.

Finally, it is difficult to see what comfort the petitioner secures from the opinion in the case of *Odil v. Maury County,* 175 Tenn. p. 550, which was delivered on February 17, 1940, and has been published since the hearing of this case in the Court of Appeals. There is, of course, no statute in Tennessee which renders counties liable in tort, and the series of negligent acts by which the subcontractor broke the pipes of the petitioner could certainly not be reasonably held to be ''a nuisance.'' The opinion in the case of *Odil v. Maury County,* 175 Tenn. at p. 551, contains a very clear statement of this respondent's position:

''In 15 C. J., 569, 570, it is said: ''In the absence of statute a county is not liable for damages to private interests by the construction of public works and improvements.''

With respect to the liability of a county for a tort the text in 14 Am. Jur., Counties, pages 215, 216, is as follows: ''It is well settled that since counties

are organized for public purposes and charged with the performance of duties as arms or branches of the State government, they are never to be held liable in a private action for neglect to perform such duties, for acts done while engaged in the performance of such duties, or because they are not performed in a manner most conducive to the safety of employees or the public, unless such liability is expressly fixed by statute."

This general rule applies to acts constituting nuisances. *Carothers v. Shelby County,* 148 Tenn., 185, 253 S.W., 708; *Vance v. Shelby County,* 152 Tenn., 141, 273 S.W., 577; *Tyler v. Obion County et al.,* 171 Tenn., 550, 106 S.W. (2d), 548; *Wehn v. Commissioners of Gage County,* 5 Neb., 494, 25 Am. Rep., 497; *Lefrois v. Monroe County,* 24 App. Div., 421, 48 N.Y.S., 519; *Matson v. Dane County,* 172 Wis., 522, 179 N.W., 774; *Hubbard v. Crawford County,* 221 Pa., 438, 70 A., 805; *Mokovich v. Independent School Dist. No.* 22, 177, Minn., 446, 225 N.W., 292.

Chandler v. Davidson County, 142 Tenn., 265, 218 S. W., 222, is not in point. The substance of the holding in that case, as interpreted in *Carothers v. Shelby County, supra,* and *Vance v. Shelby County, supra,* is that where the county departs from the delegated sovereign power of maintaining and repairing roads and bridges and creates a nuisance that results in injury, it thereby commits an actionable wrong beyond the scope of its authority and power.

Pierce v. Gibson County, 107 Tenn., 224, 233, 64 S. W., 33, 55 L.R.A., 447, 89 Am. St. Rep., 946, simply applies the universal rule that a court of chancery has authority to enjoin a nuisance."

ARGUMENT.

Since this respondent is a party to only one of the two cases in which the Petition for Certiorari is filed, the respondent is not concerned with the first two grounds, A and B, relied on by the petitioner (Br. p. 9) for filing this petition and for the jurisdiction of this Court.

Considering seriatim, the grounds set out on pages 10 and 11 of petitioner's Brief, this respondent's reply to them is as follows:

C. "Shelby County is liable for breach of its contracts." This statement of fundamental law has never been challenged by this respondent at any stage of this law suit, but the Federal Trial Judge and the Judges of the Circuit Court of Appeals concurred in their finding that there was no proper pleading or proof that respondent had breached its contract.

D. This respondent has never denied that a personal license, when properly evidenced by a written agreement or other sufficient evidence, is unassignable, but this respondent has emphatically denied and denies now that the letter given by petitioner's superintendent to the City Engineer on March 11, 1939, (R. p. 40) was or could now be reasonably construed to be a personal license or separate from the easement deed (R. p. 14) given to this respondent and its assigns by the petitioner. In this contention both the Federal Trial Judge and the Judges of the Circuit Court of Appeals have agreed with the respondent and held that the letter was integrated with and a part of the same transaction out of which the

Easement Deed arose, and that therefore since the grantor in the Easement Deed knew at the time that the rights given would be assigned to the United States Engineers, that the law governing personal licenses had no application. (R. 125, 126).

E. Since this respondent was not a licensee but a grantee with a right to assign, the law applicable to negligence of personal licensees has no application whatever.

F. This respondent has never denied that when private property is damaged in a work of public improvement, it is equivalent to a "taking" of such property within the meaning of the Constitution of the United States and of the State of Tennessee, if and *only if* the damage is necessary for the work of public improvement. If the damage is not necessary but is a result of the negligence of the agent of the County doing the work, then the agent is liable but the County itself is not liable. "If the injury is a necessary incident of necessary blasting in construction of the highway, the damages are chargeable to the condemnor, here the County. But if the injury is not such a necessary incident but is a result of the negligence of the contractor, then the damages are chargeable to him." *Newberry v. Hamblen County,* 157 Tenn. 491 at page 495.

This rule is also laid down in *Vance v. Shelby County,* 152 Tenn. 141 at page 147; *Hale v. Johnson,* 140 Tenn. 182; *Vance v. Hale,* 156 Tenn. 389; *Johnson v. Hamilton County,* 116 Tenn. page 300.

It is not contended that it was necessary to break the pipe lines in order to build the levee.

G. Except for the case of *Chandler v. Davidson County,* 142 Tenn. page 265, which is hereafter fully considered, there is no case in Tennessee in which a County has been held liable for negligence in tort. The case of *Pierce v. Gibson County,* 107 Tenn. page 224, merely holds that where an irreparable injury is about to be done to private property, that a County may be enjoined:

"*Pierce v. Gibson County,* 107 Tenn., 224, 233, 64 S.W., 33, 55 L.R.A., 447, 89 Am. St. Rep., 946, simply applies the universal rule that a court of chancery has authority to enjoin a nuisance." *Odil v. Maury County,* 175 Tenn., page 553.

The case of *Chattanooga v. Dowling,* 101 Tenn., page 342, was a suit against the City of Chattanooga as a municipal corporation, and the rule of liability in tort for municipal corporations is entirely different from the rule applicable to counties in the State of Tennessee.

We have considered the five grounds relied on by the petitioner for filing this Petition for Certiorari in the Supreme Court of the United States against Shelby County. There is not a single one of these grounds that is covered by Section 240 of the Judicial Code or by Rule 35 of this Court in which are set out in detail the reasons for which the Supreme Court of the United States will assume jurisdiction on a Petition for Certiorari and review an opinion and decree of the Circuit Court of Appeals. We submit not only that no jurisdictional ground is laid by petitioner against this respondent, but that all of the grounds laid in the petition against

this respondent were raised and fully argued by the petitioner in the Trial Court and the Court of Appeals and both those courts found against the petitioner on all of those grounds.

The motion of the County to dismiss the complaint as to it was predicated, first, upon the fact that the County is not liable in tort for the negligence of its employes or for the negligence of its independent contractors in the performance of a governmental function; that the County is not liable for breach of contract because it had done all it was obligated to do under the contract and because there was an entire lack of privity of contract between the Defendant Shelby County and the co-defendants Walker and Weaver.

We believe the Court will find conclusively that not only was the Trial Judge amply justified in sustaining the motion of the County to be dismissed prior to the trial, but that had he then overruled the motion and held the County in until the close of the Plaintiff's case, that then and at that time the Trial Court would have been compelled not only on the law but on the evidence introduced by the Plaintiff to have granted a directed verdict for the County and dismissed it on the evidence of this particular case as well as on the law.

The complaint itself, citing the Act of Congress authorizing the work, conclusively shows that the Plaintiff and its officers were well aware of the function that the County had to perform with regard to the Flood Control Project and the building of the levee and its appurtenant structures, that neither the County, nor its officers, employes, or agents, had anything whatever to do with the

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actual work of construction, with its supervision, or even with the letting of the contract therefor. That, therefore, there was neither a relation in contract nor a relation of master and servant between Shelby County and the parties who actually did the damage, even if the doctrine of Respondent Superior could be applied to a County, which is not the law.

It also appears from the testimony that the formal easement deed granted by the Plaintiff acquits and releases the County of this very claim for damages. The testimony also shows that the adequate provision for the continued use of the existing pipe lines of the Plaintiff has been made in the new levee, in accordance with the agreement with the County to that effect.

Defendant Shelby County Is Not Liable for Breach of Contract Either on the Easement or on the Letter Giving Leave to W. B. Fowler to Fill the Ditch.

In considering this phase of the appeal it is necessary to consider not only the formal easement itself and the letter given to the City Engineer to supplement it, but also the testimony of the witnesses introduced by the *Plaintiff* to show the facts and circumstances as well as the intention and knowledge of the parties.

Mr. Lynch, the Superintendent and Executive Agent for the Plaintiff, says:

> "Q. Mr. Lynch, do you mean to tell the Court and Jury that you didn't know that the United States government were going to construct this levee constituting this flood control project at the time your

company gave, and before your company gave this right-of-way to the County?

A. I didn't see any contract or anything.

Q. I didn't ask you if you saw any contract; I asked you if you knew it?

A. I heard about it, yes.

Q. You understood that the United States Government was to construct the levee?

A. Yes, sir.

Q. On the right-of-way that your company gave to the County?

A. That's right.

Q. Who negotiated with you, if negotiations were with you, for this right-of-way for the Company?

A. Mr. Fowler.

Q. Mr. Fowler?

A. Yes, sir.

Q. The same man who negotiated with you for the permit to fill the gully?

A. That's right.

Q. Was there any discussion at that time between you and Mr. Fowler as to the purpose of filling the gully?

A. No, sir.

Q. You didn't ask him any questions about it?

A. No, sir.

Q. In that permit, you stated that it was for the protection of the proposed levee. You knew then that it was the protection of the levee that was to be constructed at that point?

A. He said *they* wanted to fill the ditch.

Q. You stated in your letter that it was for the protection of the proposed levee?

A. Yes, sir.

Q. And you knew that it had reference to this levee at that point?

A. Yes, sir."

(R. 125, 126.) (Italics ours.)

Mr. Fowler, who was also called for the Plaintiff, said:

"Q. Did you tell Mr. Lynch what you wanted the right of way for and who you wanted it for?

A. You mean for the levee?

Q. Yes.

A. Yes, sir.

Q. Did you tell him—did he indicate he understood from anything you said that he knew you were getting it from them on condition that the government would build the levee?

A. I think he knew that, yes.

Q. You necessarily told him that when you asked him to practicallly give you the right of way?

A. I think that's so, yes, sir.

Q. When you were getting this permit to cross the gully—I mean fill the gully—was there any discussion of the need for that, or who it was for?

A. That wasn't a part of the right of way for which we had secured a regular easement from the Gulf Refining Company, and that had been submitted to the Government engineer and that question came up afterwards, and Mr. Lynch was in my office about another matter, I don't recall what it was, and I mentioned that *they* wanted to fill the levee.

Q. *By 'they' you mean the government?*

A. *The government wanted to fill this levee.* He wrote me a letter. Whether he took it up with his superiors or not I don't know, but he wrote me a letter saying there was no objection to having the ditch filled in."

(R. 202, 203.) (Italics ours.)

From these quotations from the testimony of Plaintiff's witnesses it is very evident that the letter of March 11th to Fowler was a supplement to the formal easement granted on February 14th, and that both parties knew that the permit granted in the letter of March 11 was

sought and granted for the U. S. Engineers, that they would use it and that the County would do no work whatever. It is also evident that the parties so considered it at the time.

The filling of the ditch and the building of the levee were both parts of the same contract and transaction between the County and the Gulf Refining Co., since the Plaintiff charges the County with liability for the breach of the following clause of the easement contract:

> "That proper and adequate provision shall be made for the continued use of the existing pipe lines."

This clause on which the County's liability is predicated was taken from the easement of February 14, 1939, and the liability of the County on account of it is to be gauged by the other provisions of that instrument.

(1) The grantor, Gulf Refining Company, knew that the United States Government and not the County was to do the construction work. (Lynch and Fowler testimony, supra R. pp. 125, 126, 202, 203.)

(2) This was contemplated in the easement deed as the habendum is "To Shelby County, Tennessee, and *its assigns.*

(3) Since the County was not to do the work, the Gulf Refining Company in the easement deed and as part of the contract with the County formally acquits and releases the County from "any and all damages • • • by reason of constructing the aforesaid levee, and/or flood walls, and *appurtenant structures, or by the exercise and use of the rights herein and hereby conveyed.*" (Easement R. p. 14.)

(4) The easement was therefore assignable to the United States Government and the indemnity given not only to the County, its officers and employes, but *its agents.* (R. 14.)

(5) The Plaintiff (Br. p. 3, 2nd par.) says that the easement was given for the nominal consideration of one dollar. This is not true as appears from the easement itself. (R. 11.) The consideration was (1) one dollar, (2) maintenance and construction of the levee, (3) building of a private road, (4) provision for use of pipe lines (which might have been terminated by condemnation).

This Court, after reading the record, will not ignore nor discount the great permanent benefit that the "maintenance and construction" of the new levee will be to the Plaintiff. Its property was subject to overflow, which prevented all use of it in times of high or flood water. The new levee and the private road over it willl insure the uninterrupted and continuous use of Plaintiff's plant and property, prevent damage, and provide means of ingress and egress at all seasons. So far from "nominal" is this consideration that we think more properly it should be called "incalculable" in dollars and cents.

Bearing in mind that from the testimony of Lynch and Fowler the Plaintiff and its officers knew that all the work on the levee would be done through the United States Government; that the only obligation of the County and the City with regard to the project was, as set out in the complaint, "to provide without cost to the United States all lands, easements and rights-of-way necessary for the construction of the proposed levee and

its approaches." It is very clear that the letter was a supplement to and a part of the original easement and that the duties of the parties under it were no different from the duty of the parties under the easement. The clause "Proper and adequate provision shall be made for the continued use of the existing pipe lines" of Plaintiff was inserted in the easement merely to make certain that in any plans by the Government Engineers for the new levee ample and adequate provision for the existing pipe lines of the Plaintiff should be made so that Plaintiff could continue after the construction of the new levee to pump its gas from barges on the river as it had in the past. There was no suggestion that the County, which the Plaintiff knew was not going to construct the levee or any part of it, should actively protect the pipe lines. The language of the easement does not have any such meaning or bear any such construction; and, indeed, such a construction would be inconsistent with the habendum of the easement, which is "to the County of Shelby, Tennessee, or its *assigns;*" with the paragraph immediately following the habendum, which is a covenant by the Plaintiff to "the County of Shelby, Tennessee, its officers, employes and agents," and with the following paragraph:

> "And for the consideration mentioned aforesaid, the said vendor, for itself, its successors and assigns, hereby *releases and acquits* the County of Shelby, Tennessee, its officers, *agents* and employes, from any and all damages to the hereinbefore described tract of land by reason of constructing the aforesaid *levees*, and/or *flood walls*, and/or *appurtenant structures*, or **by the exercise and use of the rights herein and hereby conveyed.**" (Italics ours.)

This easement specifically granted land of the Gulf Refining Company for "the construction and maintenance of said levee or any enlargement thereof." (R. 13.) And the letter of March 11th, therefore, was merely a recognition by Mr. Lynch of a notice from Mr. Fowler that the Government had decided on a structure additional and appurtenant to the original levee. Both Fowler and Lynch testify (R. p. 125, 202) that the letter was asked for and given because "they" (meaning the U. S. Engineers) wanted to fill the ditch.

Since all parties knew that the County was not going to do any of the actual construction work and for that reason the Plaintiff, Gulf Refining Company, in consideration of the proposed improvement, fully acquits and releases the County, its officers, agents and employes, from any and all damages to the tract, it results that so long as "proper and adequate provision was made for the continued use of existing pipe lines, the reversal of drainage, and the erection and maintenance of a private road across the levee" (R. 12), the County had fully discharged its obligation under the easement and is without liability.

There is Absolutely No Evidence That the Letter of March 11, 1939, Gave a Personal License To Shelby County.

The letter is short and is as follows:

"MEMPHIS TERMINAL

March 11, 1939.

Mr. W. B. Fowler,
City Engineer,
Memphis, Tenn.
Dear Sir:

Confirming recent conversation in your office, this is to advise that the Gulf Refining Co. grant you permission to fill the ditch at the west end of our property to protect the proposed levee.

Yours very truly,

RML-S

R. M. Lynch,
Superintendent."
(R. 40.)

It is fundamental that a written instrument speaks for itself; that its meaning is to be deduced from its own four corners. In other words, if an instrument creates a personal license, it says so. (Authorities cited by Petitioner, Br. pp. 26-28.) Under this rule, assuming what we do not concede, that the letter granted a *personal* license, that license was granted to Fowler as *City* (not County) Engineer. The County is not mentioned at all, but significantly the purpose of the permit is expressed "to protect the proposed levee."

The idea of a *personal* license had its inception in the resourceful and ingenious imagination of opposing counsel after he had filed his original complaint. In that there

is no intimation of the *personal* license theory, but being met by a clear and complete defense in the County's motion to dismiss (R. p. 15) on the grounds:

(1) That the easement in express words contains a release and acquittal of the claim made;

(2) That the easement is a grant to the County and its *assigns;*

(3) That there was no privity between the sub-contractor who did the damage and the County;

(4) That the County is not liable in tort,

counsel had to devise a new form of attack and amended the original complaint to introduce the personal license theory.

Why is the "*you*" of the letter, which was never acknowledged and is now being used as a self-serving declaration by appellants (the County had been dismissed from the suit at the time of its introduction) which was not addressed to the County or to one of its officials and does not mention the County by name, construed by Plaintiff to mean Shelby County? Obviously because the necessities of the invention of the personal license theory, considering the steps already taken in the suit, required such construction. The Plaintiff, for some reason, had elected to sue the County without joining the City, as was pointed out in our motion to dismiss, and the County was the *grantee in the easement.*

Clearly therefore, the only reason that it is alleegd that the letter is a permit personal to the *County* is that it was part and parcel of the transaction out of which

the easement was given. Being so, it is given as an addendum and supplement to the easement and for the same consideration, with the same limitations and conditions. Therefore, the County is clearly and expressly released and acquitted from all liability from claims for damages on the letter, which covered expressly a fill "appurtenant" to and for the protection of the "proposed levee" because both easement and letter say so. (R. p. 14, 2d par.) (R. p. 40.)

> "The rule that separate written documents between the same parties and relating to the same subject matter is indicated by the language contained therein, or satisfactorily proved by the circumstances under which they were executed, are to be construed together as one transaction, has been determined by so many authorities that there is no room for controversy regarding the principle . . . . This rule applies even though the separate written instruments were not executed on the same date."
>
> *Lynch v. The Bank, Etc.* (Cal.) 37 Pac. 716, at page 720.
>
> "If two or more agreements are executed at different times as parts of the same transaction, they will be taken and construed together."
>
> 17 C. J. S. 715;
>
> 6 R. C. L. p. 850, Sec. 240.
>
> "The question of whether or not two instruments are parts of one and the same transaction depends on the facts of each case."
>
> 17 C. J. S. 715;

Shelby County Is Not Liable In Tort for the Negligence of Its Officers, Subordinate Agents or Independent Contractors Even Though They Be Engaged In a Private Undertaking and Commit An Active Wrong on Private Property.

Appellant admits that the County, as such, is generally not liable in tort for the negligence of its officers, agents, servants and employes, but maintains that in this instance its pipe lines were broken not as the result of a governmental function by the County but by agents of the County who were trespassers on the privately owned property of the Appellant where the pipe lines were located. And further, that the County is liable under the authority of Chandler v. Davidson Co., 142 Tenn. 265, because the destruction of Plaintiff's pipe lines was a nuisance committed actively by the agents of the County beyond the scope of their authority and the performance of any governmental function. *The Chandler case is the only authority cited by appellant for this proposition.*

We insist that the County's part in the Flood Control Project and the construction of the levee and its appurtenant structures was definitely and specifically a governmental function, made so by the general law of Tennessee and by a Private Act of the Legislature of 1937 in which the Nonconnah Flood Control Project is named and authorized.

Section 4187 of the Code of Tennessee of 1932 is as follows:

> "Draining of swamp lands. The draining of swamp lands of this state is a public improvement conducive to the health of the inhabitants and the wealth of the state."

Section 4193 of the Code of Tennessee of 1932 is as follows:

> "County Courts may issue bonds for building levees. The county courts of the several counties within the limits of which are lands rendered unfit for occupation and farming purposes by reason of the overflowing of the same in times of high water in the rivers adjacent thereto, may issue bonds for the purpose of constructing levees to protect the same."

Chapter 897 of the Private Acts of 1937 expressly authorizes Shelby County to issue bonds and levy taxes for the purpose of this Flood Control Project on *Nonconnah Creek, Wolf River, and the Mississippi River.*

So not only under the general law but specifically under a special Private Act of the Legislature, Shelby County is authorized and empowered to levy taxes, issue bonds and exercise the power of eminent domain, for the purpose of building levees and flood walls on Nonconnah Creek and the Mississippi River, and this, in so many words, is declared to be a public improvement. It follows, therefore, that in carrying out the work of such public improvement, Shelby County is performing a governmental function.

As we have shown, the Code of Tennessee makes the drainage of such lands as that of Appellant a public improvement and a function of government.

There is no reason here to repeat the evidence set out in this Brief from page 20 to page 23, showing that Lynch and the officers of Petitioner knew the details of this Flood Control Project, knew that Shelby County had

no active function to perform in the construction of the levee or its appurtenant structures and, therefore, did no work whereby agents or employes of the County might have "committed an active wrong."

Petitioner's property was "privately owned," subject however to the rights voluntarily granted the County, which of course might lawfully have acquired the same or greater rights by condemnation.

The implication in Petitioner's Brief (p. 42) that the County trespassed on private property to commit an active wrong is wholly unjustified. Ingress and egress on private property during a work of public improvement is never a trespass under the Code of Tennessee, Sec. 3131, et seq., Williams Annotated Code of Tennessee.

> "The whole insistence of Plaintiff is that the City had no right to go beyond its 80 foot easement in the construction of the street and that when it did so it was a trespasser doing unnecessary injury to Plaintiff's land, thus giving Plaintiff a right to compensation by an action to trespass. We think Plaintiff's position is untenable."
>
> *Central Realty Company v. City of Chattanooga*, 169 Tenn. p. 525, at p. 529.

Chandler v. Davidson County, 142 Tenn. p. 265.

The case of Chandler v. Davidson Co., 142 Tenn. p. 265, is the only Tennessee authority which the Appellant produces to justify his claim that the County is liable in tort. This case, decided by the Supreme Court in 1919, aside from being an anomaly which has never once been followed in the many County cases decided by the Supreme Court since the date of its decision, differs in all

essential particulars from the case of the Gulf Refining Company v. Shelby County.

1. In the Chandler case, the ditch was separate from and not a part of the highway; here the fill of the ditch of the Gulf Refining Company was part of the levee and joined to it for its protection. The broken pipes were broken by an act or series of acts of negligence while the ditch was being filled for the protection of the levee.

(2) In the Chandler case, the wrong was found to be the continued maintenance of a nuisance, "apart from the road and not in building the road." (152 Tenn. p. 146.) Here there is no nuisance. The County has had no active part in the wrong and the wrong was committed in building the levee, not in a separate operation.

(3) There is no proof or pleading that the officers of Shelby County acted beyond their authority or without authority in building the levee or filling the ditch, and yet to bring this case within the scope of the opinion of the Chandler case, that fact must be made to appear according to the Plaintiff's other authority, *Carothers v. Shelby Co.*, 148 Tenn. p. 185, at page 187:

> "The nuisance is not a mere omission of duty by the county while exercising the delegated sovereign power of maintaining roads and bridges, *but an active continuing wrong beyond the scope of that power.*"

The Chandler case, which was decided in December, 1919, has never once been followed by the Supreme Court of Tennessee in any of its subsequent opinions. The rule laid down in the Chandler case was pressed as controlling

the facts of the case of Carothers v. Shelby County, supra, which was decided in 1922, but its application was denied.

Its application was again denied in the case of *Vance v. Shelby County* (1925), 152 Tenn. 141, at 147, in a bitterly contested series of cases which went three times to the Supreme Court, and in one of which the Court said:

> "The creation of a nuisance is not a mere omission of duty by the county while exercising the delegated sovereign power of maintaining roads and bridges, but is an active continuing wrong *beyond the scope of that power.*"

Fryar v. Hamilton County (1929), 160 Tenn. 216.

We believe that this decision, delivered ten years after the decision in the Chandler case, the Supreme Court of Tennessee definitely overruled the Chandler case, although it did not say so in so many words.

The facts of the Fryar case are identical in all material particulars with the facts of the Chandler case. The Highway authorities of Hamilton County for a long period of time permitted ditches and drains on the highway to be stopped up so that surface waters accumulated. These surface waters overflowed the right-of-way of the highway and accumulated on Plaintiff's *private property and buildings*, for which damage he brought suit against the County. In denying the County's liability the Court said:

> "The theory upon which the declaration proceeds is that the defendants negligently created and maintained a situation along the highway that consti-

> tuted a nuisance. The facts presented by the declaration disclose a failure to keep open ditches and drains which are an adjunct to the road, and not separate from it. The facts shown in the declaration do not bring the case within the rule of Chandler v. Davidson Co., 142 Tenn., 266. See, also, Carothers v. Shelby Co., 148 Tenn. 186. At most the declaration charges an omission of duty, or act of nonfeasance."
> (160 Tenn. 216, at p. 218.)

Surely this opinion is equivalent to a reversal of the Chandler case for there is no material difference between the two sets of facts except that suit in the Chandler case was brought against the County for personal injuries and in the other case for property damage. Surely also, this opinion in the Fryar case, which was delivered ten years after the Chandler case, is a denial of the liability of Shelby County in the case of Gulf Refining Company, and it denies specifically the liability of a County for the active wrong resulting in damage to property privately owned. Indeed, the property of Fryar was damaged by waters flowing from the highway over his private lands and buildings, with no easement, license or permit whatever.

The Supreme Court of Tennessee was called upon to pass on the rule laid down in the Chandler case, in *Scott v. Knox Co.* (1933), 166 Tenn. 585, at p. 588 and said:

> "That case (Chandler) rests upon and must be confined to its peculiar facts and a strained construction cannot extend its meaning. See Carothers v. Shelby County, supra. These cases cannot be drawn within the purview of the Chandler case by *mere*

allegations that acts, which are in fact acts of omission or commission, amount to a nuisance.''
(Italics ours.)

The fallacious reasoning of the Chandler case seems obvious to us. The County, being a corporation, can act only through its officers and subordinates, *Stanley County v. Coler*, 190 U. S. 437; yet, under the Chandler opinion the only instance where the County is *itself* liable is when those officers and subordinates have exceeded their authority and acted beyond the scope of their power.

Again, the County is a mere creature of the sovereign state, partakes of its immunity from suit, and has only such power as the State specifically gives it by statute. The only County funds are derived from taxes which are statutory, yet a wholly unauthorized expenditure of tax money is sanctioned in the Chandler opinion for the payment of a judgment in damages for negligence of the County's officers acting beyond the scope of their power and in disregard of the authority delegated to the County by the State. Gilbert and Sullivan could do no better. In an opinion delivered on Feb. 17, 1940, reported in 175 Tenn., at page 550, the Tennessee Court in *Odil v. Maury County*, again rejected the principles of the Chandler opinion and so the Court has refused to follow the opinion in the Chandler case in a single instance since the opinion was delivered.

In a leading case of the Tennessee Supreme Court, that of *McAndrews v. Hamilton Co.*, 105 Tenn. 399, which has many times been followed and approved by the

Court, it was said that counties of the state enjoy immunity from liability in tort for the reasons:

"1. That there is no fund out of which satisfaction could be had.

2. That it is better that an individual should suffer than that the public should sustain an inconvenience.

3. That it is a subordinate political or governmental division of the State.

4. That its function or action in regard to such institutions are legislative, and that neither the State nor County could be sued on such account.

5. That counties are instrumentalities of government and partake of the immunities of the States while acting in a governmental capacity."

However, petitioner in his Brief, page 42, says: "In Tennessee there is a *well recognized exception* that the County is liable if engaged in a governmental function and there is a departure from County property and a wrong to private property. Petitioner relies upon the exception to hold the County liable in tort, even though the construction of the levee and the filling of the ditch were in the discharge of public duties." If a County is liable for the commission of a tort to property at all, of course it would be "a wrong to private property." The very idea that the County should commit a tort to its own property is an absurdity. The whole matter boils down to this: Was the damage to the pipe lines of petitioner a necessary incident of the construction of the levee? If it was, it amounted to a taking of petitioner's property for public use. For that, the Constitutions of the United States and the State of Tennessee require

compensation, but since there is no assertion or proof that the damage to the pipe lines was necessary or was anything other than a result of acts of the subcontractor, negligent or not, the County is not liable to compensate the petitioner for the damage to these pipes or the result thereof.

The reasons given in the McAndrews case for the immunity of counties leave no place for the "well recognized exception" of Petitioner's Brief, p. 42. If there is no County fund available for the satisfaction of a tort committed within the scope of the authority of the County officials, certainly there is no fund available for the settlement of judgments rendered against a County for the unauthorized and irregular acts of such officials. If it is better that an individual suffer in the one case the reason holds for the other. If it is contrary to public policy for counties to expend tax money for judgments for damages arising from the performance of governmental functions, a fortiori, is it contrary to such public policy to pay damages accruing by reason of a non-governmental undertaking.

Except for the decision of the Chandler case, the Supreme Court of Tennessee from the case of Wood v. Tipton Co., 66 Tenn. 112, cited by appellant, to the recent case of Odil v. Maury Co., 175 Tenn., p. 550, has always clearly recognized the distinction between the liability of *counties* as such and the liability of the *officers* of counties as individuals. Never except in the Chandler case in an action in tort has a judgment in damages for a sum of money been sustained against a county. The rule and distinction of liability on which we insist is recognized

and exemplified in those cases where as in Pierce v. Gibson Co., 107 Tenn. 224, an injunction was granted to prevent the creation or maintenance of a nuisance. The injunction was granted against the *county*, it is true, but the county was in reality a nominal party and the effective relief was against the *officers* or *employees* of the county who were prevented by the injunction as individuals from doing certain things or committing certain acts which would legally constitute a nuisance. We submit, that in the opinion of the Chandler case, 142 Tenn. 265, at p. 272, the court in using Pierce v. Gibson Co., supra, as an authority, failed to take into consideration the very practical and fundamental difference between an injunction which is in personam and a money judgment. Had the rule and the distinction been observed and obeyed Davidson County would have been dismissed and judgment rendered personally against Hirsig and the other defendants (142 Tenn. p. 267) for their misfeasance or nonfeasance as officers of the county.

We submit, therefore, that opposing counsel (as did the learned Judge in the Chandler case) has undertaken to charge the County *itself* with a liability which is chargeable, if at all, to the agents and representatives of the County as individuals. Even if Defendants Walker and Weaver were working on a contract with Shelby County (and not with the United States Government) and if they performed that contract in a negligent manner, Walker and Weaver would be liable as individuals but Shelby County would not be liable at all.

> "If the injury is a necessary incident of necessary blasting in construction of the highway, the damages are chargeable to the condemnor, here the County.

But if the injury is not such a necessary incident, but is the result of negligence of the contractor, then the damages are chargeable to him."

Newberry v. Hamblen County, 157 Tenn. p. 491, at p. 495.

"We are of the opinion that the failure of the officers and employee of the county, who, it is alleged, destroyed, or removed the bridge from the road in question, to erect barriers or place lights or other warnings at the place where said bridge was removed for the protection of travelers, amounted to negligence, but such negligence did not render the county liable to plaintiff for the injuries sustained under the authorities above cited."

Vance v. Shelby Co., 152 Tenn. 141, at p. 147.

So also in

Hale v. Johnson, 140 Tenn. 182;
Vance v. Hale, 156 Tenn. 389.

and in

Johnson v. Hamilton Co., 116 Tenn. p. 300:

"The demurrer of the County was on the ground that the negligence complained of was shown by the declaration to have been committed by an agent or employee of the County, for which the County is not liable. The Court was clearly correct in sustaining this ground of the demurrer in favor of the County."

Neither the County nor its elected officers are liable for the negligent acts of subordinates.

Vance v. Shelby County, supra;
Lunsford v. Johnson, 132 Tenn. 615;
Robertson v. Sichel, 127 U. S. 507; 22 RCL, pp. 487, 488;
Meacham on Public Officers, Sec. 598, 664.

It results, therefore, that Shelby County itself is liable neither for breach of contract on the formal easement,

since it did all that it was obligated to do thereunder, nor on the supplementary letter of March 11th, since the County, through its officers and agents, did none of the work for which leave was granted in the letter, and the officials of the Gulf Refining Company knew that the County would do none of the work for which such leave was granted, at and before the time it was granted on March 11, 1939.

It is equally true that the County itself is not liable for negligence in tort either for the performance of a governmental function or for the performance of a non-governmental private undertaking by its officers, employes or agents.

All grounds urged by the petitioner for the issuance of a Writ of Certiorari by this Honorable Court were fully presented to both the Courts below. Both the Courts concurred in dismissing the respondent, Shelby County, both on the law and the evidence. We insist that the decisions of the lower Courts were correct in all respects and that the issuance of a Writ of Certiorari against this respondent should be denied.

Respectfully submitted,

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J. A. OSOINACH,
Of Counsel.

FILED
APR 29 1942
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1114

GULF REFINING COMPANY,

Petitioner,

vs.

MARK C. WALKER & SON COMPANY, ET AL.

No. 1115

GULF REFINING COMPANY,

Petitioner,

vs.

CHARLES WEAVER & COMPANY, INC.

BRIEF ON BEHALF OF RESPONDENTS MARK C. WALKER & SON COMPANY AND CHARLES WEAVER & COMPANY, IN REPLY TO PETITION AND BRIEF FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

WM. M. HALL,
Counsel for Respondents.

WM. M. & WM. G. HALL,
Memphis, Tenn.,
of Counsel.

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GULF REFINING COMPANY,
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CHARLES WEAVER & COMPANY, INC.,
Respondent and Appellant Below.

BRIEF ON BEHALF OF RESPONDENTS MARK C. WALKER & SON COMPANY AND CHARLES WEAVER & COMPANY, IN REPLY TO PETITION AND BRIEF FOR WRITS OF CERTIORARI.

Statement of Case.

Petitioner seeks certiorari for review here of the judgment of the Circuit Court of Appeals affirming the judgment of the District Court dismissing upon motion heard

at a pre-trial hearing petitioner's action against Shelby County, Tennessee, affirming the judgment of the District Court dismissing petitioner's action against Mark C. Walker & Son Company upon verdict directed against Mark C. Walker & Son Company upon its motion, and reversing with dismissal of action the District Court's judgment against Charles Weaver & Company.

Petitioner's action against Shelby County was upon the theory that Shelby County contracted with it not to break its pipe lines in doing or having done the flood protection work under the right and privilege which it gave the County for that purpose on a certain strip of its land and on certain of its land adjoining that strip and breached the same in that its pipe lines were broken and it suffered damages as the result; and upon the alternative theory that Mark C. Walker & Son Company who did the work, was its agent and did the work negligently and the County should respond. The County and Mark C. Walker & Son Company were sued jointly upon the alternative theory. The District Court held in effect that there was no such contract between the County and petitioner and dismissed as to the County. Petitioner thereafter amended its complaint charging in effect that Walker & Son Company had no privilege to go upon its land adjoining the right of way strip and there do the work which caused the breaking of the pipe lines. This was to forestall the anticipated defense of Walker & Son Company that the work was done by its sub-contractors, Weaver & Company, who was an independent contractor and alone liable for negligence, if any. The District Court held under that theory that Walker & Son Company did have the privilege to do said work and the right to contract with Weaver & Company to do it and had not directed a trespass in so doing and that its sub-contractor, Weaver & Company was an independent contractor

and Walker & Son Company was not liable for its negligence. Petitioner's action against Weaver & Company was independent of its action against the County and Walker & Son Company and was brought in the State Court and was upon the ground that it ran its heavy machinery used in doing the work upon the pipe lines which was negligence and the cause of their break-down and its loss. This suit was removed from the State Court to the District Court and there consolidated with petitioner's suit against the County and Walker & Son Company. The District Court overruled a motion for a directed verdict made by Weaver & Company at the conclusion of all the proof and submitted the case to the jury who returned a verdict against Weaver & Company upon which the judgment against Weaver & Company was entered.

Petitioner's complaint against the action of the Circuit Court of Appeals is put generally upon the ground that it is contrary to the settled law of Tennessee. See petition, page 4.

Petitioner's complaint against dismissal of its action against Weaver & Company, incidental to the reversal, is that that is beyond the power of the Circuit Court of Appeals under the Seventh Amendment to the Constitution of the United States. See petition, page 4.

Walker & Son Company and Weaver & Company are not concerned with and are leaving the County to answer petitioner's complaint as to the action in its favor.

Walker & Son Company are concerned only with petitioner's complaint against the action of the Circuit Court of Appeals in its favor and answering petitioner's general charge, generally, says that the action of the Circuit Court of Appeals was not contrary to the settled law of Tennessee.

Weaver & Company are concerned only with petitioner's complaint against the action of the Circuit Court of Ap-

peals in reversing the judgment of the District Court against it and answering petitioner's general charge, generally, says that that action was not contrary to the law of Tennessee. It is also concerned with the dismissal of the action against it contemplated by the reversal and says generally that the Circuit Court of Appeals is not without power to dismiss or direct dismissal of the action against it under the Seventh Amendment to the Constitution.

Respondents reverse the order pursued by petitioner and present their answers to petitioner's complaints in their chronological and more logical order.

Points and Authorities Relied On.

I.

The holding of the Circuit Court of Appeals that Walker & Son Company was not liable for the negligence of Weaver & Company and that the District Court correctly directed a verdict in its favor, was not contrary to the law of Tennessee.

Petitioner's superintendent, who was its principal witness, admitted that the rights and privileges given the County were for the benefit of the United States, who was to do the work by contract, under the Federal Flood Control Act, 33 U. S. C. A., Paragraph 701 for the protection of the City of Memphis and the County of Shelby in which it was located, incidently, the protection of petitioner's property therein (R. 125-127, 136). Walker & Son Company got its right and privilege to enter upon petitioner's property and do the work and pass the same to its sub-contractor, Weaver & Company, through the contract of the United States with itself (R. 22-27, 200). Walker & Son Company was, therefore, not a trespasser and did not direct a trespass in making a sub-contract with Weaver & Company to do the work pursuant to which Weaver & Company

acted, which would have deprived it of immunity under the independent contractor doctrine, and made it responsible for Weaver & Company's break-down of the pipe lines whether the result of negligence or not.

The evidence showed without conflict that Walker & Son Company sub-let by written contract to Weaver & Company and did not reserve therein control of Weaver & Company in the doing of the work and did not control, direct or attempt to control or direct Weaver & Company in its doing of the work thereunder (R. 22, 234, 248, 254-256, 266). Weaver & Company was, therefore, an independent contractor, solely liable for its acts of negligence.

Knoxville Iron Co. v. *Dobson*, 75 Tenn. 367;
Powell v. *Construction Co.*, 88 Tenn. 692;
Salliotte v. *Bridge Co.* (C. C. A. 6), 122 F. 378, 65 L. R. A. 620.

Railway Company v. *Beatty*, 5 Tenn. Civ. App. 186, cited by petitioner on Page 36 of its petition is not contra. The Tennessee Court of Civil Appeals and the Supreme Court of Tennessee by denying certiorari, held therein that one who contracted in consideration of a privilege to enter upon land and do work, not to damage certain things thereon, could not claim immunity under the doctrine of independent contractor, from doing of the thing contracted against, by a contractor or the contractor's sub-contractor. Walker & Son Company was under no such contract with petitioner and there was no privity between petitioner and itself under the County's contract with petitioner, if it went that far. The trial court dismissed Beatty's action against contractor and the sub-contractor in *Railway Company* v. *Beatty*, doubtless because there was no privity between them and Beatty, and the appellate court's affirmance of the judgment of the trial court indicated the correctness of that action.

II.

The holding of the Circuit Court of Appeals that the evidence was insufficient to warrant or support a verdict against Weaver & Company and that the District Court erred in denying Weaver & Company's motion for a directed verdict and submitting the case to the jury, was not contrary to the law of Tennessee.

Petitioner charged in substance and effect that Weaver & Company ran its heavy machinery which it used in and about its work, upon its pipe lines which constituted negligence in the doing of the work and that the pipe lines were broken thereby and it suffered damages (R. 57-61). The pipe lines in question were four in number and crossed a ditch which was west of the levee which was to be constructed for flood protection and was between the levee and the Mississippi River, and ran from north to south practically parallel with the levee and the Government's engineer decided after the County had gotten the right of way grant from petitioner, that it should be filled for the protection of the levee and the County secured petitioner's permission to do so. The Government's plan for the work included the ditch fill. The grade provided for the ditch fill contemplated the covering of the pipe lines to a depth of from 3 to 3½ feet. There was a concrete structure expanding the ditch on which the pipe lines rested. This structure consisted of three concrete beams containing an uncertain amount of reenforced steel 14 inches thick and 18 inches wide laid across the ditch about 4 feet apart. There was a cross beam of the same dimensions between the middle beam and the southern-most beam, with its ends set into the sides of those beams, and connecting them. This cross beam was at about the middle of the beams and the middle of the ditch. There was no pier under it and its bearing strength depended upon the attachment of its ends to those beams. There was no connection between

the northern-most beam and the middle beam. The ditch where this structure crossed was about 25 feet wide and 17 feet deep. The pipe lines were of 6 inch iron pipe and were laid on the cross beam between the middle and southern-most beams. Each of the lines contained a joint called a cast iron flange joint over the ditch space about half way between the cross beam and the west bank of the ditch without any support under them. These joints were made of an iron ring on the end of each pipe to be coupled and when the two were brought together were fastened by bolts in that part of the ring projecting beyond the pipe. Joints of that kind were used because of the ease with which they could be opened when it was desirable to uncouple the pipe. A wooden bridge for light traffic was laid across the ditch on the northern-most beam and the middle beam. This bridge was of plank laid from the top of the middle beam to the top of the northern-most beam. This bridge was to be removed when the ditch was filled (R. 96, 102-104, 140-150, 185).

Weaver & Company's contract was to fill the ditch in accordance with the Government's plan and as its engineer directed, the specified grade of the fill, as stated, carrying it from 3 to 3½ feet over the top of the pipe lines. Petitioner, presumably, was acquainted with the Government's plan and had acquiesced in it without reservations (R. 233, 211, 215).

Petitioner had no witness who testified to seeing the machine with which the ditch was filled and the pipes were covered, run upon the pipes nor was there proof of any tracks or sinks upon the fill which would indicate that a machine had run upon the pipes. Petitioner's superintendent, Lynch, who was his principal witness, testified that he was present during most of the time that the work of filling the ditch was being done and that the machine did not go upon or strike the pipes during that time, that he was not pres-

ent, however, when the dirt was placed over the pipe lines, as the fill of the ditch representing that part of the work was not reached and done until nightfall and he had to leave the work at that time and did not return until next morning, but that he did not see any tracks or sign of sinking on the fill (R. 98-104, 130). Petitioner's principal proof upon the issue was that after using one of the pipe lines and finding that a large amount of gasoline pumped through it from a barge on the river had not reached the storage tank it made an excavation over the pipe line structure and found that the lines were broken at their cast iron flange joints and that the gasoline had been lost through the break in the line that had been used.

Petitioner, with the idea evidently that it would indicate the probability that the breaks in the joints were due to the machine having been run upon them, showed by its superintendent of construction out of the New Orleans office that the pipe lines and supporting structure was in good shape when he examined it some months before (R. 176-188). Petitioner, with the same idea, asked Captain Meyer, one of the Government's engineers if the pipes and beams did not appear to be good construction work. The Captain answered that he had not examined it with that in view and could not answer without knowledge as to the exact dimensions, span, type of interior reenforcement, exterior concrete and other details entering into the problem. Pressed further, he was asked if the weight of the dirt imposed upon the pipes could cause damage to the pipes and supporting beams and he answered that assuming the pipes and beams were in sound condition in his opinion the load of dirt above the pipe would not of itself cause damage but upon cross-examination he stated that this was based upon a general view of the pipe line and beams and he would not venture judgment as an engineer as to the substantialness of the structure and pipe joints without getting down into the ditch

and examining them and getting a knowledge of all attendant circumstances and conditions and that he had not done that; and when asked about the pipe joints the breaking of which was the vital question, he stated that he was not an expert in pipe line construction, meaning that he could express no opinion (R. 216-220). Captain Myers' testimony, therefore, was not substantial evidence with respect to petitioner's theory of the probable cause of the break. Petitioner's proof had to go further and show the bearing strength of those pipe lines in their unsupported cast iron flange joints, and the weight of the 3 or 3½ feet of dirt that was laid upon them under the agreed plan, to give any support to its theory of probability, if that was sufficient and it made no such proof, from which it is to be inferred that it would be against petitioner's theory.

Weaver & Company called all of its agents who had taken part in the filling of the ditch and the covering of the pipe lines and proved by them that the machinery with which the work was done was not run upon the pipe lines nor against the pipe lines; that a Government inspector was upon the ground watching the work while the pipe lines were being covered. It further showed that the Government accepted the work without reservation or exception and that this was after it was known that the pipe lines were broken. Weaver & Company showed by an expert who was also acquainted with these lines, that unsupported cast iron flange joints would break down under a weight of two thousand pounds and by an engineer familiar with the character of dirt with which the fill was made that the dirt placed over those pipes weighed more than that. Weaver & Company also showed that it was usual and customary to do such work with the type of machine used by Weaver & Company for this work.

Petitioner did not make any proof in rebuttal as it could have done if Weaver & Company's proof was not true.

Under the Tennessee authorities such proof in such a case had to be rebutted and rebuttal proof absent, it was error to overrule a motion for directed verdict and submit the case to the jury and a judgment upon a verdict in favor of the plaintiff should be reversed and the verdict set aside and the action be dismissed.

Standard Oil Co. v. *Roach,* 19 Tenn. App. 661, 94 S. W. (2d) 63.

The Supreme Court of Tennessee denied certiorari thereby making the opinion in that case its own.

Beard v. *Beard,* 158 Tenn. 437, 14 S. W. (2d) 745.

See also—

DeGlopper v. *R. R. & Light Co.,* 123 Tenn. 633;

No. Memphis Savings Bnk. v. *Union Bridge & Construction Co.,* 128 Tenn. 166.

The Tennessee cases cited in petitioner's brief on pages 58, 59 and 60 are not only not contrary but not in point with this case.

III.

There does not appear to be any conflict in the decisions of the Circuit Courts of Appeal as to that Court's power under Rule 50 (b) of Rules of Civil Procedure, to direct dismissal of an action, consistently with the Seventh Amendment to the Constitution, upon reversal of the judgment of a District Court in favor of a plaintiff because of the insufficiency of the evidence to support a verdict where defendant had moved for a directed verdict upon that ground and the Court had denied the motion and submitted the case to the jury and the jury had returned a verdict for the plaintiff upon which the judgment had been rendered.

There was a direction to dismiss upon reversal under such conditions, in the following cases:

Eastern Live Stock Co-operative Ass'n v. *Dickenson,* (C. C. A. 4, 1939) 107 F. (2d) 116;

U. S. v. *Halliday,* (C. C. A. 4, 1941) 116 F. (2d) 812;
Conway v. *O'Brien,* (C. C. A. 2, 1940) 111 F. (2d) 611;
Brennan v. *Baltimore & O. R. Co.,* (C. C. A. 2, 1940) 115 F. (2d) 555.

No case has been found in which a Circuit Court held that a dismissal was not within its power under Rule 50 (b) under such conditions.

In the following cases there was a direction to grant or pass upon the motion for a new trial but those cases involved conditions that were different and called for new trials instead of dismissals:

Duncan v. *Montgomery Ward Co.,* (C. C. A. 8, 1940) 108 F. (2d) 848;

In the Supreme Court—

Montgomery Ward Co. v. *Duncan,* 311 U. S. 243, 85 L. Ed. 147;
Pruitt v. *Hardware Dealers Mutual Fire Ins. Co.,* (C. C. A. 5, 1940) 112 F. (2d) 140.

In the following case in which dismissal was directed upon reversal, motion for a directed verdict had been denied and submission was without express reservation but after verdict there had been motion for judgment notwithstanding:

Brunet v. *Kresge Co.,* (C. C. A. 7, 1940) 115 F. (2d) 713.

In the following cases motion had been denied and submission was with express reservation and after verdict motion had been made for judgment notwithstanding:

Limbershaft Sales Corp. v. *Spalding,* (C. C. A. 2, 1940) 111 F. (2d) 675;
Pessagno v. *Euclid Inv. Co.,* (C. C. A., Dist. C., 1940) 112 F. (2d) 577.

See Editor's note, 85 L. Ed. of U. S. Supreme Court Reports, Pages 151-311, for review of above cases and others.

The Supreme Court granted certiorari in the following cases because of the question but did not decide it because the Court found that the Circuit Courts were in error in holding that the evidence was insufficient to support a verdict:

Conway v. *O'Brien*, 312 U. S. 492, 85 L. Ed. 969;
Berry v. *U. S.*, 312 U. S. 450, 85 L. Ed. 945;
Halliday v. *U. S.*, decided January 19, 1942, — U. S. —, 86 L. Ed. 393, Adv. Sheets No. 6.

The Supreme Court denied certiorari in *Brennan* v. *Baltimore & O. R. Co.* (C. C. A. 2, 1940) 115 F. (2d) 555, 312 U. S. 685, 85 L. Ed. 1123; *Brunet* v. *Kresge Co.* (C. C. A. 7, 1940) 115 F. (2d) 713, 313 U. S. 577, 85 L. Ed. 1535.

IV.

Rule 50 (b) does not violate the Seventh Amendment and warranted the Court's dismissal in this case and direction to grant a new trial instead would have been erroneous.

In *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, 79 L. Ed. 1636, decided before the promulgation of the Rules of Civil Procedure, it was held that where a defendant moved for a directed verdict and the District Court denied its motion and submitted the case to a jury with a reservation of decision upon the motion and the jury returned a verdict for the plaintiff and judgment was entered thereon, the Circuit Court of Appeals could, upon finding that the motion should have been sustained and that the judgment was to be reversed, direct dismissal of the action without violating the Seventh Amendment, submission with reservation being in accordance with the common law practice and a question of law being left for decision. The

Circuit Court had directed, however, that a new trial be granted and the Supreme Court modified its judgment by directing dismissal in place of its direction for a new trail.

Rule 50 (b) with its provision for automatic reservation was considered by the Advisory Committee and the American Bar Association as the equivalent of the reservation approved in the Redman case as within the common law practice.

U. S. v. *Halliday* (C. C. A. 4), 116 F. (2d) 812;
3 Moore's F. Practice under New Federal Rules, 3108-3111, and 1941 Pocket Supplement, P. 61-64.

The Courts of Appeal have decided the cases cited above upon that idea.

A motion after verdict for judgment notwithstanding has not been deemed necessary to preserve the question of law made by the denial of the motion for a directed verdict.

See cases first cited under Point III.

In *U. S.* v. *Halliday, supra,* it was expressly held that while a motion after verdict for judgment notwithstanding would have been the better part of wisdom, it was not essential.

In *Baltimore & Carolina Line* v. *Redman, supra,* it did not appear that there had been any motion after verdict for a judgment notwithstanding.

A motion for a judgment n.o.v. is no more necessary to preserve the question of law made by the denial of a motion for a directed verdict, than a petition to rehear is necessary to the preservation of the question as to the incorrectness of a Court's judgment under the law.

The Supreme Court's denial of certiorari in *Brennan* v. *Baltimore & O. R. Co.,* 115 F. (2d) 255, 312 U. S. 685, 85 L. Ed. 1123, makes that case direct authority, it is respectfully submitted.

Conclusion.

Respondents respectfully submit that the petition for certiorari should be denied.

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